TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 220

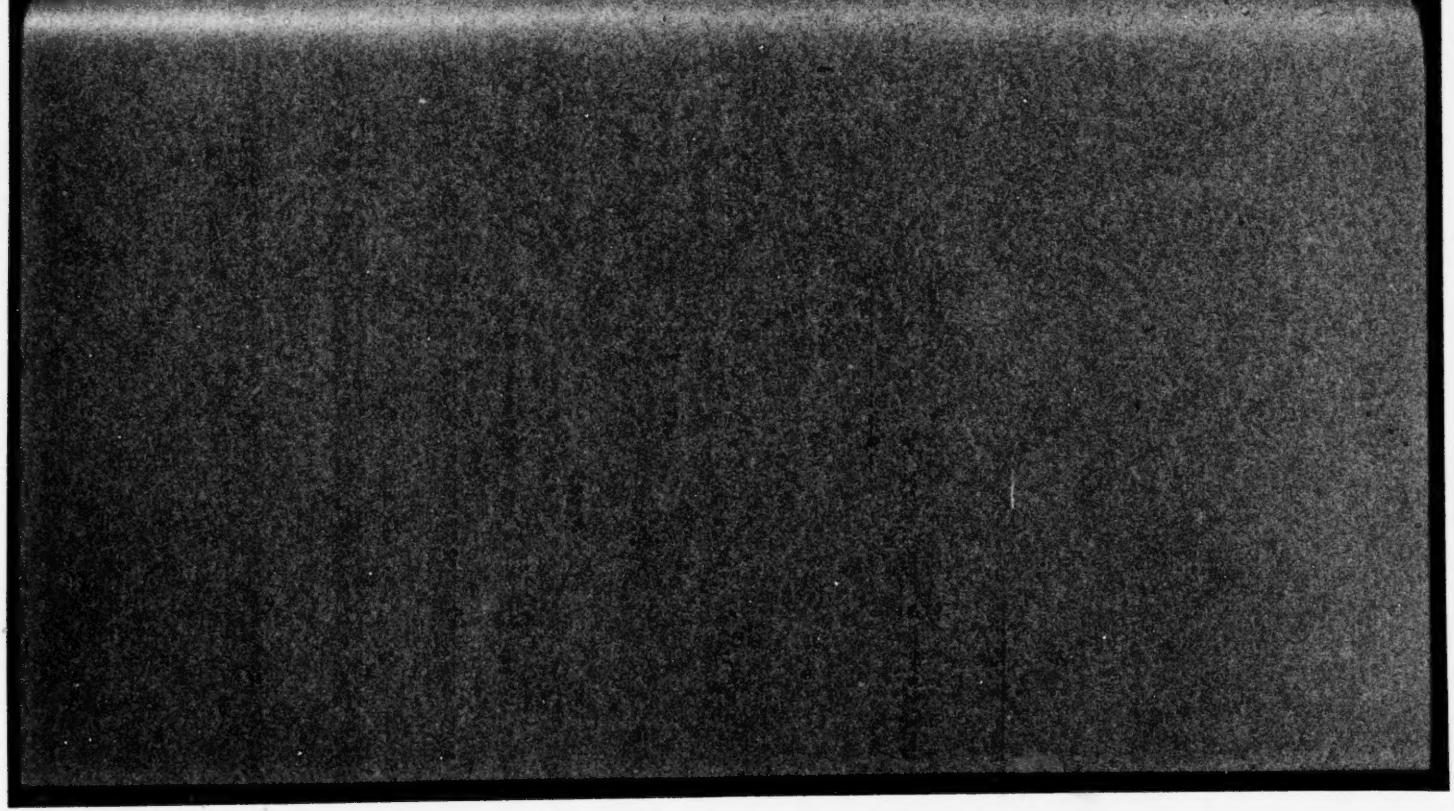
THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GUSTAV A. KIESEL AND FRANK A. HARRIS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 30, 1910.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 714.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GUSTAV E. KISSEL AND THOMAS B. HARNED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 *Petition for writ of error.*

United States Circuit Court for the Southern District of New York, in the Second Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
GUSTAV E. KISSEL, THOMAS B. HARNED, IMPLEADED with others, defendants in error.

Now comes the United States of America, by its attorney, Henry A. Wise, and complains that in the record and proceedings had in this cause an order overruling the demurrers interposed by the United States to the several special pleas interposed by the defendants, Gustav E. Kissel and Thomas B. Harned, and directing that said pleas be severally sustained as sufficient in law and directing that judgment be entered in accordance therewith overruling the said several demurrers and each of them, and sustaining said pleas and each of them and dismissing as to said defendants, Kissel and Harned, the indictment found and filed on July 1st, 1909, and in the judgment of said court entered pursuant to and in accordance with said order overruling the said demurrers and adjudging that the said pleas be severally sustained as sufficient in law, and that the indictment so found as aforesaid be dismissed as to the defendants, Kissel and Harned, manifest error hath happened as will appear in the assignment of errors herewith submitted.

2 Wherefore said defendants Kissel and Harned not having been put in jeopardy, the United States of America prays for the allowance of a writ of error and such other orders and process as may cause the same to be corrected by the Supreme Court of the United States.

Dated New York, December 8th, 1909.

HENRY A. WISE,
United States Attorney in and for the Southern District of New York,
Attorney for Petitioner.

The foregoing petition is hereby granted.
Dated New York, December 8, 1909.

GEO. C. HOLT,
U. S. Circuit Judge for the Second Circuit.

(Indorsed:) Service of a copy of the within is hereby admitted and of the assignment of errors. New York, Dec. 8, 1909. William C. Osborn, attorney for Deft. Kissel. Hunt, Hill & Betts, attorneys for Deft. Harned. U. S. Circuit Court, Southern District N. Y. Filed Dec. 8, 1909. John A. Shields, clerk.

3 *Writ of error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, Greeting:

Because in the record and proceedings, as also in the order and judgment of a plea, which is in the said Circuit Court of the United States in the Southern District of New York for the Second Circuit before you or some of you, in a case between the United States of America and Gustav E. Kissel and Thomas B. Harned, impleaded with others, a manifest error hath happened to the great damage of the said United States of America as by its complaint appears, and being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, and said defendants not having been put in jeopardy, we do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days of the date hereof; that the record and proceedings aforesaid being accepted said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

4 Witness the Hon. Melville W. Fuller, Chief Justice of the United States, on the 8th day of December, in the year of our Lord one thousand nine hundred and nine.

[SEAL.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

Allowed by—

GEO. C. HOLT,
U. S. Circuit Court Judge for the Second Circuit.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the pages numbered from one to 153, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The United States of America, plaintiff in error, against Gustav E. Kissel and Thomas B. Harned, impleaded with others, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the Southern [SEAL.] District of New York, in the Second Circuit, this 18th day of December, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-fourth.

JOHN A. SHIELDS, *Clerk.*

5 (Indorsement:) Form No. 336. U. S. Circuit Court, Southern District of New York for the Second Circuit. The United States of America, plaintiff in error, vs. Gustav E. Kissel and Thomas B. Harned, impleaded with others, defendants in error. Writ of error. U. S. Circuit Court, Southern District, N. Y. Filed Dec. 8, 1909. John A. Shields, clerk. Henry A. Wise, United States attorney, attorney for U. S. Service of a copy of the within is hereby admitted. New York, Dec. 8, 1909. William C. Osborn, attorney for Deft. Kissel to Hunt, Hill & Betts, attorney for Deft. Harned.

6 *Indictment.*

In the Circuit Court of the United States of America for the Southern District of New York, of the June term, in the year nineteen hundred and nine.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The grand jurors for the United States of America, empaneled and sworn in the Circuit Court of the United States of America at the June term thereof in the year nineteen hundred and nine, and inquiring for that district, upon their oath present, that for six years and upwards prior to the day of the finding and presentation of this indictment, The American Sugar Refining Company, hereafter in this indictment called corporation defendant, has been, and now is, a corporation organized and existing under and by authority of the laws of the State of New Jersey, with its principal offices at No. 117 Wall street, in the Borough of Manhattan, in the city of New York, and in said Southern District of New York; and that Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, and John E. Parsons, each late of said borough, city, and district, have been respectively directors of said corporation, and together have controlled and managed its affairs, said John E. Parsons also being its *gerenal* counsel and said Arthur Donner its treasurer.

And the grand jurors aforesaid, upon their oath aforesaid,
7 do further present, that throughout the period of time aforesaid The American Sugar Refining Company aforesaid has carried on, among others, the business of manufacturing refined sugar from suitable raw materials, at its manufacturing plant situated in Jersey City in the State of New Jersey (that being an article of prime necessity to and used in enormous quantities by the people

of the United States); of selling such refined sugar to dealers therein and consumers thereof in all the States of the United States, and, in pursuance of such sales, shipping such refined sugar from said place of manufacture in part into said State of New Jersey, but principally into all the other States of the United States, to such dealers and consumers; and of shipping such refined sugar from such place of manufacture to its agents in said State of New Jersey and in such other States, for sale there on its account by such agents to dealers in and consumers of the same; and that in so carrying on said business in the manner aforesaid said corporation defendant has been and is now engaged in trade and commerce among the several States of this Union within the meaning of the act of Congress approved July 2, 1890, and entitled "An act to protect trade and commerce against unlawful restraints and monopolies;" and, further, that of the total volume of such interstate business, trade, and commerce which has been carried on during the period aforesaid by said corporation defendant and by its competitors, said corporation defendant has had and controlled the principal part, that is to say, ninety per centum thereof.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that throughout said period of six years the Pennsylvania Sugar Refining Company has been and now is a corporation organized and existing under and by authority of the laws of
8 the State of Pennsylvania; that said Pennsylvania Sugar Refining Company was organized and created and has existed for the purpose of carrying on, in competition with said corporation and individual defendants, to the extent of its capacity, the same business, trade, and commerce, except as to volume and place of manufacture, as that in this indictment before described as the business, trade, and commerce of said corporation defendant; that said Pennsylvania Sugar Refining Company, early in said period, to wit, on the thirtieth day of December, in the year nineteen hundred and three, having, by the expenditure of a large sum of money, to wit, the sum of two millions of dollars, acquired the necessary grounds for and erected an extensive sugar-manufacturing plant at the city of Philadelphia, in the State of Pennsylvania, and provided the necessary facilities for so doing, was about to engage in and carry on, and intended to engage in and carry on, said business, trade, and commerce, in accordance with said purpose of its organization, creation, and existence, and throughout the remainder of said period would so have carried on said business, trade, and commerce, if it had not been for the unlawful and corrupt conduct of said corporation defendant, of its said directors, and of certain other individual defendants, hereinafter named, which is now to be described.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that The American Sugar Refining Company aforesaid, corporation defendant as aforesaid, said Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, and one Thomas B. Harned and one Gustav E.

Kissel, in this indictment hereafter called individual defendants, on said thirtieth day of December, in the year nineteen hundred
9 and three, and continuously and at all times during said period of six years, to wit, from that day until and on the day of the finding and presentation of this indictment, each then well knowing all the premises in this indictment aforesaid, in violation of the provisions of section one of said act of Congress, have engaged in an unlawful and corrupt conspiracy among themselves in restraint of said trade and commerce in refined sugar among the several States of the United States; that is to say, a conspiracy unreasonably to restrain and eliminate free competition, and prevent all competition, with said corporation defendant, in such trade and commerce, by said Pennsylvania Sugar Refining Company, to the very great injury and detriment, financial and moral, of the people of the United States, and this by and through the unfair, deceitful, unlawful and corrupt means and practices on the part of said corporation and individual defendants which are now here described:

First. One Adolph Segal, of said city of Philadelphia, being on said thirtieth day of December, in the year nineteen hundred and three, the treasurer of the Champion Construction Company, a corporation, and the owner and holder of a majority of its capital stock, and said Champion Construction Company being the owner and holder of a majority, to wit, twenty-six thousand out of a total of fifty thousand of the shares of the capital stock of said Pennsylvania Sugar Refining Company, and said Adolph Segal therefore being the virtual owner and holder of a controlling interest in the stock of said Pennsylvania Sugar Refining Company; and said corporation and individual defendants then having knowledge of said facts pertaining to said Adolph Segal's said stock ownership in and control of
10 said Champion Construction Company and Pennsylvania Sugar Refining Company, said corporation and individual defendants were to get from said Champion Construction Company, through said Adolph Segal, for said corporation defendant, the possession, use and control of, and the authority to vote, said shares of capital stock in, and thereby secure the power of control over and management of, said Pennsylvania Sugar Refining Company for the term of one year at least, to be accomplished by inducing said Adolph Segal to borrow, for the term of one year from the fourth day of the then next succeeding month of January, from said Gustav E. Kissel, acting as a broker and as the agent for a lender whose identity was not to be by him or any of said defendants disclosed to said Adolph Segal, but which lender was in fact to be said corporation defendant, a large sum of money, to wit, of the sum of twelve hundred and fifty thousand dollars, at six per cent interest, for use in his business as a promoter of hotel and manufacturing enterprises, and to transfer to said Gustav E. Kissel, together with other security for the repayment of said sum of money, written authority to exercise the power of voting as a holder of said twenty-six thousand shares of stock of said Pennsylvania Sugar Refining Company, without said

Adolph Segal being aware of the fact that said corporation defendant would be the real lender of such sum of money to him, and without his suspecting the designs of said corporation and individual defendants in the premises, or having reason to suppose that such undisclosed lender would have any other desire but one to obtain the interest upon and the repayment of such sum when due, or any motive for preventing said Pennsylvania Sugar Refining Company from carrying on its said intended business, trade, and commerce, and thereby earning profits and paying dividends to its stock-
11 holders in such a way as to enable said Adolph Segal to pay such interest and repay such principal sum so to be borrowed; it being a fact, as the grand jurors aforesaid, upon their oath aforesaid, charge it to be, that, as said corporation and individual defendants then well knew, said Adolph Segal would be dependent upon such dividends for moneys with which to pay such interest and repay such borrowed sum and, in the event of said Pennsylvania Sugar Refining Company's failure to carry on its said business, trade, and commerce and pay such dividends, his financial affairs would be put in a ruinous condition, and the hold of said corporation defendant upon him and upon said Pennsylvania Sugar Refining Company, by reason of such his obligations to said corporation defendant, continued and greatly strengthened.

Second. When the power of control over and management of said Pennsylvania Sugar Refining Company should so be acquired by said corporation defendant for the term of one year in the manner aforesaid, said corporation and individual defendants were to use every means in their power to extend said term and said power of control, particularly by keeping said Adolph Segal involved in debt and his affairs in such a condition as to prevent his relieving himself from his obligations to said corporation defendant, and by wrongfully and arbitrarily refusing to accept payment of such obligations from him, either before or at their maturity, or to surrender to him such power of control over and management of said Pennsylvania Sugar Refining Company.

Third. When the power of control over and management of said Pennsylvania Sugar Refining Company should be so acquired by said corporation and individual defendants in the manner
12 aforesaid, said corporation and individual defendants were to make use of the same to prevent said Pennsylvania Sugar Refining Company from engaging in or carrying on, in whole or in part, the business, trade, and commerce which it was so organized for carrying on, and had so prepared to carry on, and so intended to carry on, as aforesaid; and were thereby to bring about the ruin of said Pennsylvania Sugar Refining Company through inaction, and the destruction of its said property and facilities through decay, and eliminate and entirely prevent the competition with said corporation defendant which would, but for the acts of said corporation and individual defendants in the premises, come into existence through the operation of said Pennsylvania Sugar Refining Company.

OVERT ACTS.

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Gustav E. Kissel during said period of six years, to wit, on said thirtieth day of December, in the year nineteen hundred and three, at said borough of Manhattan, in said city and southern district of New York, unlawfully did sign his name to wit, Gustav E. Kissel, to, and execute, and procure said Adolph Segal to execute, a certain written agreement, that is to say, an agreement which, with such signatures, then was and now is of the tenor following:

"Agreement made December thirtieth, nineteen hundred and three (1903), by and between Adolph Segal, herein called the borrower, and Gustav E. Kissel, as agent, his principals and their assigns,
13 being herein called the lenders, witnesseth:

"Whereas, the borrower desires to borrow one million two hundred and fifty thousand dollars ($1,250,000) from the lenders upon the terms and conditions hereof and of a stock note to be given therefor, of which the following is a copy:

"'$1,250,000. NEW YORK.

"'Twelve months after date, for value received, I promise to pay to Gustav E. Kissel, agent, or his assigns, one million two hundred and fifty thousand dollars ($1,250,000), with interest at six per cent per annum, payable quarterly on April 2d, July 2d, October 2d, and January 2d, having deposited with him as collateral security for payment of this or any other liability or liabilities to his principals or their assigns, due or to become due, or that may be hereafter contracted, the following property, to wit:

"'One thousand first mortgage bonds of $1,000 each of the Majestic Apartment House Co., Philadelphia; five hundred first mortgage bonds of $1,000 each of the Pennsylvania Sugar Refining Company; receipt of Frank K. Hipple for twenty-six thousand (26,000) shares of the capital stock of the Pennsylvania Sugar Refining Company, the right to the stock and all voting and other rights which belong to it, with full power and authority, in case of the non-payment of the said sum of money at maturity, or of either or any of the instalments of interest as they shall become payable, to sell the whole or
14 any part of such securities at any broker's board or at public or private sale, at his or their option, at any time or times thereafter without advertisement or notice to me, and with the right on his or their part to become purchasers thereof at such sale or sales freed and discharged of any equity of redemption, and after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made to pay the said indebtedness, or so much thereof as shall remain unpaid, and whether due or to become due, returning the overplus, if any, to the undersigned, and I will still remain liable for any amount

unpaid. This note, with the securities, may be transferred by the said Gustav E. Kissel, agent, his principals, or by his or their assigns, the holder at any time to have all the rights herein conferred upon him and them, with no remaining or continuing liability of the transferrer.'

"And whereas, a substantial part of the security therefor consists in the said five hundred (500) $1,000 bonds of the Pennsylvania Sugar Refining Company, and the right to the said twenty-six thousand (26,000) shares of the stock of that company, and the voting and other powers which belong to that stock, the borrower hereby covenanting that the same has been regularly issued as full paid stock and constitutes a majority of all the stock of the Company, with the control thereby given.

"Now, therefore, the parties have agreed, and they hereby do agree, as follows:

"1. The borrower, that the said bonds of the Majestic Apartment House Co. are the entire issue of such bonds, and that they are
15 secured by a first mortgage of the property known as the Majestic apartment house in Philadelphia; that the borrower will furnish to the lenders a policy of title insurance issued by the Real Estate Trust Company of Philadelphia insuring the title to the property as free and clear of and from all prior liens and incumbrances, and insuring the validity of the mortgage as legally executed to be a first lien thereon.

"2. The borrower, as the Majestic apartment house is not yet completed, agrees that the lenders may retain and withhold two hundred thousand dollars ($200,000) of the said loan, to be paid over in monthly instalments of fifty thousand dollars ($50,000), each, upon certificates by the architect that the amount has, in addition to all previous payments, been expended upon the property, the last fifty thousand dollars ($50,000) not to be paid over until the Majestic apartment house is fully completed, free from all claims for taxes, mechanic's liens, claims by contractor, and other claims whatsoever, such two hundred thousand dollars ($200,000) to be deposited in the U. S. Mortgage and Trust Company of New York, to remain until the borrower, shall be entitled to receive the same or shall be in default, he to have the trust company interest thereon, in case of any default the lenders to be entitled to a return of so much of the same as shall remain and to allow for the same.

"3. The borrower agrees that the entire issue of first mortgage bonds of the Pennsylvania Sugar Refining Company is three
16 million dollars ($3,000,000) and no more, consisting in three thousand bonds, each of one thousand dollars ($1,000); the said five hundred bonds (500) being one-sixth of the total authorized issue, and that such issue is secured by a first mortgage of the property of the Pennsylvania Sugar Refining Company; that the borrower will furnish the lenders a policy of title insurance issued by the Real Estate Trust Company of Philadelphia, insuring the title to the property as free and clear of all prior liens and incumbrances,

and insuring the validity of the mortgage as legally executed so as to be a first lien thereon.

"4. The borrower agrees that he will so arrange that the absolute voting power for the said twenty-six thousand (26,000) shares of the stock of the Pennsylvania Sugar Refining Company shall be in the lenders; that the lenders shall have the right to use such voting power as may be suitable to aid or effectuate the purposes hereof; and as the control thereby given is a material part of the consideration for the said note, the borrower further agrees that he will so arrange that, of the seven directors of the said Pennsylvania Sugar Refining Company, four to be nominated by the lenders, of whom one shall be the said Gustav E. Kissel, shall be put in place of four of the present directors, that they, or substitutes to be nominated by the lenders, shall be directors so long as any part of the loan shall remain unpaid; that the control and possession of the property of the said the Pennsylvania Sugar Refining Company shall be in such way and so
17 effectu*a*lly subjected to the control of the board of directors that so long as the note, or any part thereof, remains unpaid, the refinery of the said the Pennsylvania Sugar Refining Company shall only be run or operated or do business as shall be directed by such board of directors; any expense caused by the possession of the property, or in carrying out this agreement on the part of the lenders, to be added to the said note and to be entitled to the security and to the benefit of all the provisions on the part of the borrower therein contained with like effect as if the same had been specially mentioned therein.

"5. The borrower may pay the said note with unpaid interest to time of payment at any time after October 1st, 1904, and not before.

"6. The lenders agree that upon compliance with the foregoing provisions on the part of the borrower they will, upon the terms herein, and in the said note contained, make the said loan.

"In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

"ADOLPH SEGAL. [SEAL.]
"GUSTAV E. KISSEL, *Agent.* [SEAL.]"

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Thomas B. Harned afterwards, to wit, on said thirtieth day of December, in the year nineteen hundred and three, at said city of Philadelphia,
18 in said State of Pennsylvania, unlawfully did sign his name, to wit, Thomas B. Harned, to, and execute, as president of the Champion Construction Company, a corporation, a certain document in writing, to wit, a document which with such signature, then was and now is of the tenor following:

"DECEMBER 30, 1903.

"The Champion Construction Company hereby consents and agrees that the 26,000 shares of the capital stock of the Pennsylvania

Sugar Refining Company, mentioned in the foregoing papers, shall be used as therein provided.

"THE CHAMPION CONSTRUCTION COMPANY,
"THOMAS B. HARNED, *President.*
"ADOLPH SEGAL, *Treasurer.* [SEAL.]
"WM. H. WHITESIDE, *Secretary.*"

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Thomas B. Harned afterwards, to wit, on said thirtieth day of December, in the year nineteen hundred and three, at Philadelphia aforesaid, unlawfully did sign his name, to wit, Thomas B. Harned, to a certain power of attorney, to wit, a written power of attorney which, with such signatu[illegible] then was and now is of the tenor following:

"Know all men by these presents, that the undersigned, being the owner of 26,000 shares of the capital stock of the Pennsylvania Sugar Refining Company, do hereby constitute and appoint Gustav
19 E. Kissel its true and lawful attorney, in its name and stead, to vote upon the stock owned by it or standing in its name, as its proxy at any and all meetings of the stockholders of the said company, hereby granting the said attorney full power and authority to act for it and in its name at the said meeting or meetings, in voting for directors of the said company or otherwise, and in the transaction of such other business as may properly come before the meeting, as fully as it could do if acting under its proper officers, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or substitute may do in its place, name, and stead. This proxy is irrevocable pending the life of a certain agreement bearing even date herewith between A. Segal and said Kissel.

"In witness whereof this proxy is executed by direction of the board of directors of the Champion Construction Company, under the seal of said company, duly signed by its president and secretary this 30th day of December, 1903.

"CHAMPION CONSTRUCTION COMPANY,
"By THOMAS B. HARNED, *President.*

"Attest:
"WM. H. WHITESIDE, *Secretary.*"

4. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Gustav E. Kissel afterwards, to wit, on said thirtieth day of December, in the year nineteen hundred and three, at Philadelphia aforesaid,
20 unlawfully did attend a meeting of the board of directors of said Pennsylvania Sugar Refining Company, and as such director did vote in favor of and so secure the adoption of a resolution of the said board to the effect that said Pennsylvania Sugar Refining

Company should thereafter refrain from carrying on its business until the further order of said board of directors.

5. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy and to effect the object of the same said Arthur Donner afterwards, to wit, on the thirty-first day of December, in the same year, nineteen hundred and three, at said borough of Manhattan, in said city and Southern District of New York, unlawfully did sign his name, to wit, Arthur Donner, to, and execute as treasurer of the American Sugar Refining Company, a certain check, to wit, a check of the tenor following:

This check is issued in payment of

No. 49821 JERSEY CITY, N. J. *Dec 31 1903*
250000

First National Bank of Jersey City, N. J.

Pay to the order of Gustav E. Kissel Two hundred & fifty thousand # Dollars

THE AMERICAN SUGAR REFINING CO.
$250.000# per ARTHUR DONNER *Treasurer.*

Payable through New York Clearing House.

6. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Gustav E. Kissel afterwards, to wit, on said thirty-first day of December, in the year nineteen hundred and three, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did write and sign his name to a certain receipt, to wit, a receipt of the tenor following:

21

NEW YORK *Dec 31" 1903*

Received from The American Sugar Refining Company Two hundred & fifty thousand dollars ($250000.) to be applied on account of loan of $1250000. made to A. Segal by me, as agent, under a contract dated Dec. 30" 1903, it being understood that I am to use said sum only upon delivery to me of

$2,600000. Penn. Sugar Refinery stock trust certificate
250000. " " " 1st Mtg 5% bonds
250000. Majestic Appartment House 1st Mtg 5% bonds

GUSTAV E. KISSEL.

7. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to *the* effect the object of the same, The American Sugar Refining Company aforesaid afterwards, to wit, on the fourth day of January, in the year nineteen hundred and four, at

said Borough of Manhattan, in said city and Southern District of New York, unlawfully did draw three certain checks, to wit, one check of the tenor following:

22

This check is issued in payment of

No. 49836 JERSEY CITY, N. J. *Jan 4 1904*

First National Bank of Jersey City, N. J.

Pay to the order of Gustav E. Kissel Two hundred & fifty thousand # Dollars

THE AMERICAN SUGAR REFINING CO.

$250,000# per C. R. HEIKE *Secretary.*

Payable through New York Clearing House.

Another check of the tenor following:

This check is issued in payment of

No. 2972 NEW YORK, *Jan 4 1904*

The Bank of New York National Banking Association

Pay to the order of Gustav E. Kissel Two hundred & fifty thousand # Dollars

THE AMERICAN SUGAR REFINING COMPANY OF NEW YORK.

$250,000# per C. R. HEIKE *Treasurer.*

23 And another check of the tenor following:

This check is issued in payment of

No. 5444 NEW YORK, *Jan 4 1904*

National City Bank in New York City.

Pay to the order of Gustav E. Kissel Five hundred thousand # Dollars

THE AMERICAN SUGAR REFINING COMPANY OF NEW YORK.

$500,000# per C. R. HEIKE *Treasurer.*

8. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Gustav E. Kissel afterwards, to wit, on said fourth day of January, in the year nineteen hundred and four, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did write and sign a certain other receipt, to wit, a receipt of the tenor following:

NEW YORK *Jan 4" 1904*

Received from the American Sugar Refinery Co. One million dollars ($1000000) to be applied on account of loan of $1,250,000.— made to A. Segal by me as agent, under contract dated Dec 30" 1903 is being understood that I am to use said sum only upon delivery to me of the securities specified in said contract—

GUSTAV E. KISSEL

9. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Gustav E. Kissel afterwards, to wit, on said fourth day of January, in the year nineteen hundred and four, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did sign his name, to wit, Gustav E. Kissel, to a certain statement of account, to wit, a typewritten statement of account, which, with such signature, then was and now is of the tenor following:

GUSTAV E. KISSEL,
34 Nassau Street, New York, January 4th, 1904.

A. SEGAL, Esq.,

DEAR SIR: The amount of principal on my loans to you, due today, together with interest to date, is $610,606.66—arrived at as follows:

Loan of Dec. 22nd—	$120.000	
13 days at 6% on $60.000	130	
12 " " 6% " 60,000	120	$120,250.
Loan of Dec. 30th—	180,000	
5 days at 6%	150	180,150.
Loan of Dec. 31st—	310,000.00	
4 days at 6%	206.66	310,206.66
		$610,606.66

Yours very truly,

GUSTAV E. KISSEL.

10. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Gustav E. Kissel afterwards, to wit, on said fourth day of January, in the year nineteen hundred and four, at said Borough of Manhattan, in said city and Southern District of New York, unlaw-

fully did sign his name, to wit, Gustav E. Kissel, to a certain letter in two places, to wit, a typewritten letter which, with such signatures then was and now is, of the tenor following:

GUSTAV E. KISSEL,
34 Nassau Street, New York, January 4th, 1904.

AMERICAN SUGAR REFINING COMPANY:

DEAR SIRS: The transaction with Mr. Adolph Segal having been closed this day, I beg herewith to enclose, for your reference, copy of contract executed between Adolph Segal and G. E. Kissel, agent, and to report that I hold the following documents and securities for your account:

1. Contract dated December 30th, 1903, between Adolph Segal and G. E. Kissel.
2. Note of Adolph Segal for $1,250,000, as described in contract.
3. $2,600,000 Pennsylvania Sugar Refining Co. stock.
4. $500,000 Pennsylvania Sugar Refinery first mortgage 5% bonds.
5. $750,000 Majestic apartment house of Philadelphia first mortgage 5% bonds.
6. $250,000 underlying mortgage on Majestic apartment house formerly owned by me; this mortgage is to be satisfied of record
26 to-morrow and cancelled, and the Real Estate Trust Company of Philadelphia, who are trustees under the mortgage, will then give to me the remaining $250,000 Majestic Hotel bonds which they hold in the interim.
7. Copy of the minutes of directors' meeting of the Pennsylvania Sugar Refining Co., at which Mess. Kissel, Walter D. Robinson, George L. Twigg, and Morris J. Werner were elected directors and resolution concerning the closing of the refinery was passed, certified as a correct copy by the secretary.
8. Letter from Thomas B. Harned, president, relative to voting of stock.
9. Letter from W. Ramsey, president of the Sugar Refining Company, stating that he will follow the instructions of a majority of the board of directors.
10. Letter from Frank K. Hipple, president of the Real Estate Trust Company, stating that he can exercise no rights concerning the voting of the stock which he holds as trustee.
11. Irrevocable proxy for 26,000 shares of the capital stock of the Pennsylvania Sugar Refining Company.

Yours, truly,

GUSTAV E. KISSEL.

As the 1,500 bonds are voluminous, I have rented safe No. 2588 in the National Safe Deposit Company, of New York, 32 Liberty street, where the above-mentioned securities and papers now are.

GUSTAV E. KISSEL.

11. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, The American Sugar Refining Company aforesaid afterwards, to wit, on the fifth day of January, in the year nineteen hundred and four, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did cause to be written a certain letter, to wit, a letter of the tenor following:

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NEW YORK, *January 5th, 1904.*

G. E. KISSEL, Esq.

DEAR SIR: Referring to the loan made by you as agent for us to Mr. Segal under the agreement of December 30th, 1903, we will hold you harmless by reason of the execution of that agreement and of any action taken under it. It is understood, however, that in this transaction any services which have been rendered by you are for Mr. Segal and that you must obtain your compensation from him and that you are not to look to us. We wish you to have this clearly understood by Mr. Segal and would prefer that he express the understanding in writing.

Yours, very truly,

THE AMERICAN SUGAR REFINING CO.,
H. O. HAVEMEYER, *Prest.*

12. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Arthur Donner, Charles H. Senff, George H. Frazier, and John E. Parsons afterwards, to wit, on the twenty-third day of May, in the year nineteen hundred and five, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did attend a meeting of the executive committee of the board of directors of The American Sugar Refining Company aforesaid.

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13. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Washington B. Thomas, Arthur Donner, Charles H. Senff, and John Mayer afterwards, to wit, on the thirteenth day of February, in the year nineteen hundred and seven, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did attend a meeting of the board of directors of The American Sugar Refining Company aforesaid, and at such meeting did each vote for and thereby secure the adoption of certain resolutions to the effect following:

"*Resolved*, That in accordance with the resolution passed by the stockholders at their last annual meeting, the secretary, in the name of and for the company, send to the president a letter giving to him a copy of the resolution of the stockholders in reference to proceedings in the Segal matter, asking him to cooperate in defending

against any such proceedings: and agreeing as to him that the company assumes the entire responsibility of what has occurred in the Segal matter; and that it will defend, protect, and indemnify him, and in the event of a suit and possible recovery, that it will either pay the same, or if an appeal shall be taken, that it will stay proceedings and secure and, if and when required, make payment.

"*Resolved*, That in accordance with the resolution passed by the stockholders at their last annual meeting, the secretary, in
29 the name of and for the company, send to Mr. John E. Parsons, the counsel of the company, a letter giving to him a copy of the resolution of the stockholders in reference to proceedings in the Segal matter; asking him to cooperate in defending against any such proceedings; and agreeing as to him that the company assumes the entire responsibility of what has occurred in the Segal matter; and that it will defend, protect, and indemnify him; and in the event of a suit and possible recovery, that it will either pay the same, or if an appeal shall be taken, that it will stay proceedings and secure and, if and when required, make payment."

14. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said John E. Parsons afterwards, to wit, on the fifteenth day of February, in the year nineteen hundred and seven, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did sign his name, to wit, Jno. E. Parsons, to a certain letter, to wit, a letter which then and there was, and is, of the tenor following:

PARSONS, CLOSSON & MCILVAINE,
52 William Street, New York, February 15th, 1907.

Mr. C. R. HEIKE, *Secretary*,
117 Wall Street.

DEAR SIR:

Segal.

30 I am in receipt of yours of February 14th enclosing resolution passed by the directors of The American Sugar Refining Company at their meeting on February 13th, 1907, for which accept my thanks.

For some reason which is not clear to me, Mr. Earle has delayed proceedings. The Department of Justice ought to refuse, and I hope that it will refuse, to aid Mr. Earle's claim. Mr. Johnson describes the claim as "farcical." However this may be, I shall, both on the company's account and on my own, cooperate in defending any proceedings which may be taken by Mr. Earle.

Yours, truly,

JNO. E. PARSONS.

15. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Gustav E. Kissel afterwards, to wit, on the third day of May, in the year nineteen hundred and seven, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did sign his name, to wit, Gustav E. Kissel, to a certain other letter, to wit, a typewritten letter which, with his said signature, then was and now is of the tenor following:

(Members New York Stock Exchange. Cable address "Kiskin," New York.)

KISSEL, KINNICUTT & CO.,
37 Wall Street, New York, May 3d, 1907.

THE AMERICAN SUGAR REFINING CO.

DEAR SIRS: I beg herewith to send you vouchers for the 31 following expenditures chargeable to you in connection with the loan made to Adolph Segal by me as your agent:

American Sugar Refining Co. to Gustav E. Kissel, Dr.

1904.	National Safe Deposit Co., of New York:	
Jan. 16.	Rent of vault, Dec. 31/03 to June 30/04	$50.00
June 30.	" " " June 30 to Dec. 31/04	50.00
1905.		
June 17.	" " " Dec. 30/04 to June 30/05	50.00
Dec. 23.	" " " June 30/05 to Dec. 30/05	50.00
1906.		
June 21.	" " " Dec. 30/05 to June 30/06	50.00
Dec. 8.	" " " June 30 to Dec. 30/06	50.00
Feb. 28.	Expenses of Mr. W. D. Robinson, trip to Phila., to demand payment of 3,000 Majestic coupons	6.00
Mar. 23.	Expressage on coupons of Penna. Sugar bonds sent to Philadelphia for payment	2.50
Jan. 3.	Cravath, Henderson & DeGersdorff (legal services in connection with loan)	250.00
Mar. 25.	Retainer paid to Mr. John G. Johnson, through Morgan & Lewis	100.00
Apr. 25.	Retainer paid to Mr. Howard Taylor	1,000.00
		$1,658.50

for which I beg you to have the kindness to send me check, as I am starting for Europe on May 15th.

Yours, very truly, GUSTAV E. KISSEL.

16. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, The American Sugar Refining Company aforesaid, corporation as aforesaid, afterwards, to wit, on the tenth day of May, in the year nineteen hundred and seven, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did settle and pay a certain claim and account of said Gustav E. Kissel against it, to wit, the claim and account, in the total sum of $1,658.50, shown in the letter set forth according to its tenor in "Overt act" No. 15 in this indictment.

32 17. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said Washington B. Thomas, Arthur Donner, Charles H. Senff, George H. Frazier, John Mayer, and John E. Parsons afterwards, to wit, on the twelfth day of November, in the year nineteen hundred and seven, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did attend a meeting of the Directors of The American Sugar Refining Company aforesaid.

18. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful and corrupt conspiracy, and to effect the object of the same, said John E. Parsons, afterwards, to wit, on the nineteenth day of April, in the year nineteen hundred and nine, at said Borough of Manhattan, in said city and Southern District of New York, unlawfully did sign his name, to wit, Jno. E. Parsons, to a certain letter, to wit, a letter which then and there was, and is, of the tenor following:

APRIL 19TH, 1909.

Mr. C. R. HEIKE, Esq.,
117 Wall Street.

DEAR SIR: I will send the advertisement about the Pennsylvania Sugar Refining Company bonds to Mr. Johnson. He has the matter in charge. With the bonds held by Mr. Kissel I should think that we represented so considerable a holding as to make it undesirable to submit the bonds to the action of a probably hostile commit-
33 tee. Should any action be required, I will let you know.

Yours, truly,

JNO. E. PARSONS.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The American Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, at and within said Southern District of New York, throughout the period of three years next preceding the finding and presentation of this indictment, in manner and form aforesaid, unlawfully have engaged in a conspiracy in restraint of trade and commerce in refined sugar among the several States; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

SECOND COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants named in the first count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B.

Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy,
34 in said first count set forth, unlawfully have knowingly and corruptly monopolized a part of the trade and commerce among the several States, to wit, the interstate trade and commerce in refined sugar; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

THIRD COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that said corporation and individual defendants named in the first count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy, in said first count set forth, unlawfully have knowingly and corruptly attempted to monopolize a part of the trade and commerce among the several States, to wit, the interstate trade and commerce in refined sugar, against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

FOURTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that said corporation and individual defend-
35 ants named in the first count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said

conspiracy, in said first count set forth, unlawfully have each knowingly and corruptly conspired with the others to monopolize a part of the trade and commerce among the several States, to wit, the interstate trade and commerce in refined sugar; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

FIFTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that for six years and upwards prior to the day of the finding and presentation of this indictment, The American Sugar Refining Company, hereafter in this indictment called corporation defendant, has been, and now is, a corporation organized and existing under and by authority of the laws of the State of New Jersey, with its principal offices at No. 117 Wall street, in the Borough of Manhattan, in the city of New York, and in said Southern District of New York; and that Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, and John E. Parsons, each late of said borough, city, and district, have been respectively directors of said corporation, and together have
36 controlled and managed its affairs, said John E. Parsons also being its general counsel and said Arthur Donner its treasurer.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that throughout the period of time aforesaid The American Sugar Refining Company aforesaid has carried on, among others, the business of purchasing raw sugar and molasses in the markets of the States of the United States where the same has been exclusively produced from the soil, to wit, Louisiana and Texas, and causing such raw sugar and molasses to be shipped from those markets to its refinery situated in Jersey City, in the State of New Jersey, as raw materials for the manufacture of refined sugar—there being no such raw materials produced from the soil of said State of New Jersey, and such refined sugar being an article of prime necessity to and used in enormous quantities by the people of the United States; and that in so carrying on in the manner aforesaid the business in this count of this indictment described said corporation defendant has been, and is now, engaged in trade and commerce among the several States of this Union within the meaning of the act of Congress approved July 2, 1890, and entitled "An act to protect trade and commerce against unlawful restraints and monopolies"; and, further, that of the total volume of such interstate business, trade, and commerce in raw sugar and molasses which has been carried on during the period aforesaid by said corporation defendant and by its competitors, said corporation defendant has had and controlled the principal part, that is to say, ninety per centum thereof.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that throughout said period of six years the Penn-
37 sylvania Sugar Refining Company has been, and now is, a corporation organized and existing under and by authority of the

laws of the State of Pennsylvania; that said Pennsylvania Sugar Refining Company was organized and created and has existed for the purpose of carrying on, to the extent of its capacity and in competition with said corporation defendant, the same business, trade, and commerce, except as to volume and place of manufacture, as that in this count of this indictment before described as the business, trade, and commerce of said corporation defendant; that said Pennsylvania Sugar Refining Company, early in said period, to wit, on the thirtieth day of December, in the year nineteen hundred and three, having, by the expenditure of a large sum of money, to wit, the sum of two millions of dollars, acquired the necessary grounds for and erected an extensive sugar-manufacturing plant at the city of Philadelphia, in the State of Pennsylvania, and provided the necessary facilities for so doing, was about to engage in and carry on, and intended to engage in and carry on, said business, trade, and commerce in raw sugar and molasses, in accordance with said purpose of its organization, creation, and existence, and throughout the remainder of said period would so have carried on said business, trade, and commerce, if it had not been for the unlawful and corrupt conduct of said corporation defendant, of its said directors, and of certain other individual defendants hereinafter named, which is now to be described.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that The American Sugar Refining Company aforesaid, corporation defendant as aforesaid, said Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H.
38 Frazier, John E. Parsons, and one Thomas B. Harned and one Gustav E. Kissel, in this indictment hereafter called individual defendants, on said thirtieth day of December, in the year nineteen hundred and three, and continuously and at all times during said period of six years, to wit, from that day until and on the day of the finding and presentation of this indictment, each then well knowing all the premises in this indictment aforesaid, in violation of the provisions of section one of said act of Congress, have engaged in an unlawful and corrupt conspiracy among themselves in restraint of said trade and commerce in the purchase and sale of raw sugar and molasses, among the several States of the United States; that is to say, a conspiracy unreasonably to restrain and eliminate free competition and prevent all competition with said corporation defendant in such last-mentioned trade and commerce by said Pennsylvania Sugar Refining Company, to the very great injury and detriment, financial and moral, of the people of the United States—and this by and through the unfair, deceitful, unlawful, and corrupt means and practices on the part of said corporation and individual defendants which are now here described:

First. One Adolph Segal, of said city of Philadelphia, being, on said thirtieth day of December, in the year nineteen hundred and three, the treasurer of the Champion Construction Company, a corporation, and the owner and holder of a majority of its capital stock, and said Champion Construction Company being the owner and

holder of a majority, to wit, twenty-six thousand out of a total of fifty thousand, of the shares of the capital stock of said Pennsylvania Sugar Refining Company, and said Adolph Segal therefore being the virtual owner and holder of a controlling interest in the stock of said Pennsylvania Sugar Refining Company; and said corporation and individual defendants then having knowledge of said facts pertaining to said Adolph Segal's said stock ownership in and control of said Champion Construction Company and Pennsylvania Sugar Refining Company, said corporation and individual defendants were to get from said Champion Construction Company, through said Adolph Segal, for said corporation defendant, the possession, use, and control of, and the authority to vote, said shares of capital stock in, and thereby secure the power of control over and management of, said Pennsylvania Sugar Refining Company for the term of one year at least, to be accomplished by inducing said Adolph Segal to borrow, for the term of one year from the fourth day of the then next succeeding month of January, from said Gustav E. Kissel, acting as a broker and as the agent for a lender whose identity was not to be by him or any of said defendants disclosed to said Adolph Segal, but which lender was in fact to be said corporation defendant, a large sum of money, to wit, of the sum of twelve hundred and fifty thousand dollars, at six per cent interest, for use in his business as a promoter of hotel and manufacturing enterprises, and to transfer to said Gustav E. Kissel, together with other security for the repayment of said sum of money, written authority to exercise the power of voting as a holder of said twenty-six thousand shares of stock of said Pennsylvania Sugar Refining Company, without said Adolph Segal being aware of the fact that said corporation defendant would be the real lender of such sum of money to him, and without his suspecting the designs of said corporation and individual defendants in the premises, or having reason to suppose that such undisclosed lender would have any other desire but one to obtain the interest upon and the repayment of such sum when due, or any motive for preventing said Pennsylvania Sugar Refining Company from carrying on its said intended business, trade, and commerce, and thereby earning profits and paying dividends to its stockholders in such a way as to enable said Adolph Segal to pay such interest and repay such principal sum so to be borrowed; it being a fact, as the grand jurors aforesaid, upon their oath aforesaid, charge it to be, that, as said corporation and individual defendants then well knew, said Adolph Segal would be dependent upon such dividends for moneys with which to pay such interest and repay such borrowed sum, and in the event of said Pennsylvania Sugar Refining Company's failure to carry on its said business, trade, and commerce and pay such dividends his financial affairs would be put in a ruinous condition, and the hold of said corporation defendant upon him and upon said Pennsylvania Sugar Refining Company, by reason of such his obligations to said corporation defendant, continued and greatly strengthened.

Second. When the power of control over and management of said Pennsylvania Sugar Refining Company should so be acquired by said corporation defendant for the term of one year in the manner aforesaid, said corporation and individual defendants were to use every means in their power to extend said term and said power of control, particularly by keeping said Adolph Segal involved in debt and his affairs in such a condition as to prevent his relieving himself from his obligations to said corporation defendant, and by wrongfully and arbitrarily refusing to accept payment of such obligations from him, either before or at their maturity, or to surrender to him such power of control over and management of said Pennsylvania Sugar Refining Company.

41 Third. When the power of control over and management of said Pennsylvania Sugar Refining Company should be so acquired by said corporation and individual defendants in the manner aforesaid, said corporation and individual defendants were to make use of the same to prevent said Pennsylvania Sugar Refining Company from engaging in or carrying on, in whole or in part, the business, trade and commerce which it was so organized for carrying on, and had so prepared to carry on, and so intended to carry on, as in this count aforesaid; and were thereby to bring about the ruin of said Pennsylvania Sugar Refining Company through inaction, and the destruction of its said property and facilities through decay, and eliminate and entirely prevent the competition with said corporation defendant in the purchase and interstate shipment of raw sugar and molasses which would, but for the acts of said corporation and individual defendants in the premises, come into existence through the operation by said Pennsylvania Sugar Refining Company of its manufacturing plant in this count mentioned.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the unlawful and corrupt conspiracy in this count mentioned and described, and to effect the object of that conspiracy, said corporation and individual defendants, during said period of six years, to wit, at the several times in that behalf in said first count specified under the caption of "Overt acts," unlawfully did do and commit the several overt acts in said first count charged against them under said caption of "Overt acts."

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The American Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John

42 Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, at and within said Southern District of New York, throughout the period of three years next preceding the finding and presentation of this indictment, in manner and form in this count of this indictment aforesaid, unlawfully have engaged in a conspiracy in restraint of trade and commerce, in the purchase and shipment of raw sugar and molasses, among the several

States; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

SIXTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants named in the fifth count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy, in the first count of this indictment set forth, unlawfully have knowingly and corruptly monopolized a part of the trade and commerce among the several States, to wit, the interstate trade and commerce in the purchase and shipment of raw sugar and molasses; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

43 SEVENTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants named in the fifth count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy, in the first count of this indictment set forth, unlawfully have knowingly and corruptly attempted to monopolize a part of the trade and commerce among the several States, to wit, the interstate trade and commerce in the purchase and shipment of raw sugar and molasses; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

EIGHTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants

named in the fifth count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in
44 the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy, in the first count of this indictment set forth, unlawfully have each knowingly and corruptly conspired with the others to monopolize a part of the trade and commerce among the several States, to wit, the interstate trade and commerce in the purchase and shipment of raw sugar and molasses; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

NINTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that for six years and upwards prior to the day of the finding and presentation of this indictment, The American Sugar Refining Company, hereafter in this indictment called corporation defendant, has been, and now is, a corporation organized and existing under and by authority of the laws of the State of New Jersey, with its principal offices at No. 117 Wall street, in the Borough of Manhattan, in the city of New York, and in said Southern District of New York; and that Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, and John E. Parsons, each late of said borough, city, and district, have been respectively directors of said corporation, and together have controlled and managed its affairs, said John E. Parsons also being its general counsel and said Arthur Donner its treasurer.

45 And the grand jurors aforesaid, upon their oath aforesaid, do further present, that throughout the period of time aforesaid, The American Sugar Refining Company aforesaid, has carried on, among others, the business of purchasing raw sugar and molasses in certain foreign countries, to wit, Cuba, Java, and Borneo, and causing such raw sugar and molasses to be shipped to its refinery situated in Jersey City, in the State of New Jersey, as raw materials for the manufacture of refined sugar—there being no such raw materials produced from the soil of said State of New Jersey, and such refined sugar being an article of prime necessity to, and used in enormous quantities by, the people of the United States; and that in so carrying on in the manner aforesaid the business in this count of this indictment described, said corporation defendant has been, and is now, engaged in trade and commerce with foreign nations within the meaning of the act of Congress approved July 2, 1890, and en-

titled "An act to protect trade and commerce against unlawful restraints and monopolies;" and, further, that of the total volume of such foreign business, trade, and commerce in raw sugar and molasses which has been carried on, during the period aforesaid, by said corporation defendant and by its competitors, said corporation defendant has had and controlled the principal part, that is to say, ninety per centum thereof.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that throughout said period of six years the Pennsylvania Sugar Refining Company has been, and now is, a corporation organized and existing under and by authority of the laws of the State of Pennsylvania; that said Pennsylvania Sugar Refining Company was organized and created and has existed for the purpose of carrying on, to the extent of its capacity and in competition
46 with said corporation defendant, the same business, trade, and commerce, except as to volume and place of manufacture, as that in this count of this indictment before described as the business, trade and commerce of said corporation defendant; that said Pennsylvania Sugar Refining Company, early in said period, to wit, on the thirtieth day of December, in the year nineteen hundred and three, having, by the expenditure of a large sum of money, to wit, the sum of two millions of dollars, acquired the necessary grounds for and erected an extensive sugar manufacturing plant at the city of Philadelphia, in the State of Pennsylvania, and provided the necessary facilities for so doing, was about to engage in and carry on, and intended to engage in and carry on, said business, trade, and commerce in raw sugar and molasses, in accordance with said purpose of its organization, creation and existence, and throughout the remainder of said period would so have carried on said business, trade, and commerce, if it had not been for the unlawful and corrupt conduct of said corporation defendant, of its said directors, and of certain other individual defendants, hereinafter named, which is now to be described.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that The American Sugar Refining Company aforesaid, corporation defendant as aforesaid, said Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, and one Thomas B. Harned, and one Gustav E. Kissel, in this indictment hereafter called individual defendants, on said thirtieth day of December, in the year nineteen hundred and three, and continuously and at all times during said period of six years, to wit, from that day until and on the day of the
47 finding and presentation of this indictment, each then well knowing all the premises in this count of this indictment aforesaid, in violation of the provisions of section one of said act of Congress, have engaged in an unlawful and corrupt conspiracy among themselves in restraint of said trade and commerce with foreign nations in the purchase and shipment of raw sugar and molasses; that is to say, a conspiracy unreasonably to restrain and eliminate free

competition, and prevent all competition with said corporation defendant, in such last-mentioned trade and commerce, by said Pennsylvania Sugar Refining Company, to the very great injury and detriment, financial and moral, of the people of the United States—and this by and through the unfair, deceitful, unlawful, and corrupt means and practices on the part of said corporation and individual defendants which are now here described:

First. One Adolph Segal, of said city of Philadelphia, being, on said thirtieth day of December, in the year nineteen hundred and three, the treasurer of the Champion Construction Company, a corporation, and the owner and holder of a majority of its capital stock, and said Champion Construction Company being the owner and holder of a majority, to wit, twenty-six thousand out of a total of fifty thousand, of the shares of the capital stock of said Pennsylvania Sugar Refining Company, and said Adolph Segal therefore being the virtual owner and holder of a controlling interest in the stock of said Pennsylvania Sugar Refining Company; and said corporation and individual defendants then having knowledge of said facts pertaining to said Adolph Segal's said stock ownership in and control of said Champion Construction Company and Pennsylvania Sugar
48 Refining Company, said corporation and individual defendants were to get from said Champion Construction Company, through said Adolph Segal, for said corporation defendant, the possession, use and control of, and the authority to vote, said shares of capital stock in, and thereby secure the power of control over and management of, said Pennsylvania Sugar Refining Company for the term of one year at least—to be accomplished by inducing said Adolph Segal to borrow, for the term of one year from the fourth day of the then next succeeding month of January, from said Gustav E. Kissel, acting as a broker and as the agent for a lender whose identity was not to be by him or any of said defendants disclosed to said Adolph Segal, but which lender was in fact to be said corporation defendant, a large sum of money, to wit, of the sum of twelve hundred and fifty thousand dollars, at six per cent interest, for use in his business as a promoter of hotel and manufacturing enterprises, and to transfer to said Gustav E. Kissel, together with other security for the repayment of said sum of money, written authority to exercise the power of voting as a holder of said twenty-six thousand shares of stock of said Pennsylvania Sugar Refining Company, without said Adolph Segal being aware of the fact that said corporation defendant would be the real lender of such sum of money to him, and without his suspecting the designs of said corporation and individual defendants in the premises, or having reason to suppose that such undisclosed lender would have any other desire but one to obtain the interest upon and the repayment of such sum when due, or any motive for preventing said Pennsylvania Sugar Refining Company from carrying on its said intended business, trade, and commerce and thereby earning profits and paying dividends to its stockholders in such a way as to enable said Adolph Segal to pay such interest

49 and repay such principal sum so to be borrowed; it being a fact, as the grand jurors aforesaid, upon their oath aforesaid, charge it to be, that, as said corporation and individual defendants then well knew, said Adolph Segal would be dependent upon such dividends for moneys with which to pay such interest and repay such borrowed sum, and, in the event of said Pennsylvania Sugar Refining Company's failure to carry on its said business, trade, and commerce and pay such dividends, his financial affairs would be put in a ruinous condition, and the hold of said corporation upon him and upon said Pennsylvania Sugar Refining Company, by reason of such his obligations to said corporation defendant, continued and greatly strengthened.

Second. When the power of control over and management of said Pennsylvania Sugar Refining Company should so be acquired by said corporation defendant for the term of one year in the manner aforesaid, said corporation and individual defendants were to use every means in their power to extend said term and said power of control, particularly by keeping said Adolph Segal involved in debt and his affairs in such a condition as to prevent his relieving himself from his obligations to said corporation defendant, and by wrongfully and arbitrarily refusing to accept payment of such obligations from him, either before or at their maturity, or to surrender to him such power of control over and management of said Pennsylvania Sugar Refining Company.

Third. When the power of control over and management of said Pennsylvania Sugar Refining Company should be so acquired by said corporation and individual defendants in the manner aforesaid, said corporation and individual defendants were to make use of the same to prevent said Pennsylvania Sugar Refining Company from
50 engaging in or carrying on, in whole or in part, the business, trade, and commerce which it was so organized for carrying on, and had so prepared to carry on, and so intended to carry on, as in this count aforesaid; and were thereby to bring about the ruin of said Pennsylvania Sugar Refining Company through inaction and the destruction of its said property and facilities through decay, and eliminate and entirely prevent the competition with said corporation defendant in the purchase and interstate shipment of raw sugar and molasses which would, but for the acts of said corporation and individual defendants in the premises, come into existence through the operation by said Pennsylvania Sugar Refining Company of its manufacturing plant in this count mentioned.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the unlawful and corrupt conspiracy in this count mentioned and described, and to effect the object of that conspiracy, said corporation and individual defendants during said period of six years, to wit, at the several times in that behalf in said first count specified under the caption of "Overt acts," unlawfully did do and commit the several overt acts in said first count charged against them under said caption of "Overt acts."

And so the grand jurors aforesaid, upon their oath aforesaid, do say that said The American Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel at and within said Southern District of New York, throughout the period of three years next preceding the finding and presentation of this indictment, in manner and from in this count of this indictment aforesaid, unlawfully have engaged in a conspiracy in re-
51 straint of trade and commerce in the purchase and shipment of raw sugar and molasses with foreign nations; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

TENTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants named in the ninth count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy, in said first count set forth, unlawfully have knowingly and corruptly monopolized a part of the trade and commerce with foreign nations, to wit, the trade and commerce in the purchase and shipment of raw sugar and molasses; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

ELEVENTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants named in the ninth count of this indictment, to wit, The American Sugar
52 Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy, in said first count set forth, unlawfully have knowingly and corruptly attempted to monopolize a part of the trade and commerce with foreign nations,

to wit, the trade and commerce in the purchase and shipment of raw sugar and molasses; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

TWELFTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants named in the ninth count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harnard, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt
53 acts, in pursuance and to effect the object of said conspiracy, in said first count set forth, unlawfully have each knowingly and corruptly conspired with the others to monopolize a part of the trade and commerce with foreign nations, to wit, the trade and commerce in the purchase and shipment of raw sugar and molasses; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

THIRTEENTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants named in the first, fifth, and ninth counts of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by engaging, during the period of time in those counts specified, and in the manner and under the circumstances and conditions in said counts described, in the several unlawful and corrupt conspiracies in those counts mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said several conspiracies, which are in said first count set forth, in violation of section one of said act of Congress, unlawfully have knowingly and corruptly engaged in a conspiracy among themselves in restraint of trade and commerce among the several States and with foreign nations, to wit, the interstate and foreign trade and commerce in the purchase and shipment of the materials, to wit, raw sugar and molasses, for manufacturing refined sugar, and the interstate trade and commerce in refined sugar manufactured
54 from such materials; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

FOURTEENTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporation and individual defendants named in the first count of this indictment, to wit, The American Sugar Refining Company, corporation as aforesaid, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Thomas B. Harned, and Gustav E. Kissel, individuals, in and by doing, during the period of time in the same count specified, and in the manner and under the circumstances and conditions in the first, fifth, and ninth counts of this indictment described, of the several things in those counts charged against them, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts in said first count set forth, in violation of section two of said act of Congress, unlawfully have knowingly and corruptly monopolized, and attempted to monopolize, and conspired to monopolize, a part of the trade and commerce among the several States and with foreign nations, to wit, the interstate and foreign trade and commerce in the purchase and shipment of the materials, to wit, raw sugar and molasses, for manufacturing refined sugar, and the interstate trade and commerce in refined sugar manufactured from such materials; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

HENRY A. WISE,
United States Attorney.
JOHN W. H. CRIM,
Assistant United States Attorney.

55 (Endorsed:) U. S. Circuit Court. The United States of America vs. American Sugar Refining Company and others. Indictment under sections I & II, Sherman anti-trust law (act of July 2, 1890). Henry A. Wise. A true bill. J. Lawrence Aspinwall, foreman. U. S. Circuit Court, Southern District N. Y. Filed Jul. 1, 1909. John A. Shields, clerk. 1909, July 16. Defendants Thomas, Donner, Senff, Frazier, Parsons, Kissel, Harned, and American Sugar Ref. Co. plead not guilty with leave to withdraw July 20, 1909. July 19, Mayer pleads not guilty. July 19, filed stipulation adjourning time to withdraw plea, etc., to Aug. 31, 1909. July 29, Deft. Kissel withdraws plea of not guilty. July 29, filed plea in bar, Kissel. Aug. 3, Deft. Harned withdraws plea of not guilty. Aug. 3, filed plea in bar, Harned. Sept. 22, filed demurrer to Deft. Kissel's first plea. Sept. 22, filed demurrer to plea. Sept. 22, filed demurrer to Harned plea. Sept. 30, filed joinder in demurrer. Oct. 26, filed opinion, Holt, J. (on demurrers to pleas in bar). Nov. 9, filed order and judgment. Nov. 27, motion for re-settlement of judgment. Nov. 27, filed order re-settling order of judgment and judgment.

56 *Pleas in bar by defendant Kissel.*

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA *versus* GUSTAV E. KISSEL, IMPLEADED WITH THE AMERICAN Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, and Thomas B. Harned, defendants.	Pleas in bar.

And now, on this day, comes into court the above-named defendant Gustav E. Kissel, in his own proper person and by counsel, and having heard read the indictment against him in the above-entitled proceeding found on the first day of July, one thousand nine hundred and nine, says that the United States ought not further to prosecute said indictment against him because of the following matters and things which he pleads in bar of its prosecution for any and all the alleged offenses therein charged, and he respectfully avers as follows, to wit:

First. For a first and separate plea to each and every of the counts in said indictment contained this defendant avers:

57 I. That the alleged offenses charged against this defendant in said indictment, and in each and every count thereof, are barred by the provisions of section one thousand and forty-four of the Revised Statutes of the United States of America, in that said indictment was not found within three years next after the offenses therein alleged, or any of them, were committed.

II. That the said indictment against this defendant was found on the first day of July, in the year one thousand nine hundred and nine, and that more than three years had then elapsed between the commission of the offenses therein alleged, and each of them, and the finding of said indictment.

III. That for more than three years next preceding said first day of July, one thousand nine hundred and nine, this defendant did not directly or indirectly do any act or thing whatsoever in aid or furtherance of or to effect or tending to effect the object of any conspiracy or conspiracies in restraint of trade or commerce among the several States or with foreign nations alleged in the several counts of said indictment; that within said period of three years he was not a member of and did not engage, participate, or take part in any such conspiracy or conspiracies; that the acts and things alleged in said indictment to have been done within said period of three years, whether by him or by others, were not acts or things in aid or furtherance of or to effect or tending to effect the object of any such conspiracy or conspiracies, and that the alleged overt acts and things averred in said indictment to have been done by others within three years next preceding the finding of said indictment, being alleged therein as overt acts Nos. 13, 14, 17 and 18, to wit,

"(1) That certain of the defendants named in said indict-
58 ment attended as directors a meeting of the board of directors of The American Sugar Refining Company on the thirteenth day of February, one thousand nine hundred and seven, at the Borough of Manhattan, in the city and Southern District of New York, and voted in favor and secured the adoption of certain resolutions in said indictment set forth, such resolutions being averred therein as 'Overt act' No. 13.

"(2) That the defendant John E. Parsons, at said borough, city, and district, signed his name to a certain letter dated New York, February 15, 1907, set forth in said indictment, to C. R. Heike, such letter being averred therein as 'Overt act' No. 14.

"(3) That certain of the defendants named in said indictment attended as directors a meeting of the directors of The American Sugar Refining Company on the twelfth day of November, one thousand nine hundred and seven, at said borough, city, and district, such attendance being averred in said indictment as 'Overt act' No. 17.

"(4) That the defendant John E. Parsons, at said borough, city, and district, signed his name to a certain letter dated April 19, 1909, set forth in said indictment, to C. R. Heike, such letter being averred therein as 'Overt act' No. 18,"

were each and all of them done without this defendant's participation, knowledge, consent, agreement, authority, or ratification.

IV. That heretofore, in the Court of Common Pleas No. 4 for the county of Philadelphia, being a court of record and of general jurisdiction in the State of Pennsylvania, in a certain suit brought by Edward C. Babcock against the Pennsylvania Sugar Refining Company, being the same corporation as is mentioned and described in said indictment, such proceedings were duly had that on the second
59 day of October one thousand nine hundred and six, said Court of Common Pleas duly entered an order appointing George H. Earle, of the city of Philadelphia, receiver of said company as an insolvent corporation and duly enjoined said company and its officers and agents from in any way intermeddling with or in any manner disposing of its assets and property, and duly confirmed said order on the sixth day of October, one thousand nine hundred and six, all as will more fully and at large appear by reference to the orders of said Court of Common Pleas, an exemplified copy of which will be produced on the hearing of this plea, and a copy of which is hereto annexed as Exhibit "A" and made part hereof, and that thereupon said Earle qualified as such receiver and duly took exclusive possession of all and singular the assets and property of said company and duly took exclusive charge and duly assumed exclusive control of all and singular its business affairs and choses in action and has ever since duly continued in such possession, charge, and control. That this defendant was not a party to and did not participate in the said action or in the said proceeding for the appointment of a receiver, and did not, directly or indirectly, procure, induce, counsel, advise, aid or abet the

institution of the said action, the appointment of the said receiver, or the making of the said orders, Exhibit "A."

V. That for more than three years next preceding said first day of July, one thousand nine hundred and nine, this defendant has not monopolized, or attempted to monopolize, or combined or conspired with any other person or persons to monopolize, and has not done any act or thing whatsoever to monopolize or tending to monopolize any part of the trade or commerce among the several States or with foreign nations.

60 VI. That for more than three years next preceding said first day of July, one thousand nine hundred and nine, this defendant did not directly or indirectly do any act or thing whatsoever in aid or furtherance of or to effect or tending to effect the object of any conspiracy or conspiracies to monopolize any part of the trade or commerce among the several States or with foreign nations alleged in the several counts of said indictment; that within said period of three years he was not a member of and did not engage, participate or take part in any such conspiracy or conspiracies; that the acts and things alleged in said indictment to have been done within said period of three years, whether by him or by others, were not acts or things in aid or furtherance of or to effect or tending to effect the object of any such conspiracy or conspiracies, and that the alleged overt acts and things averred in said indictment to have been done by others within three years next preceding the finding of said indictment, as aforesaid, were each and all of them done without this defendant's participation, knowledge, consent, agreement, authority, or ratification.

VII. That, at all the times mentioned in said indictment and until the present time, and at all times since the thirtieth day of December, one thousand nine hundred and three, this defendant was subject to the process of this court, and has been and still is an inhabitant and resident of the city of Morristown in the State of New Jersey, where he has resided with his family the greater part of the year; that at all such times he has been continuously engaged in business in the city of New York as a banker, and there present almost daily; that during the winter months of each year he has resided with his family

61 in his own house in the city and Southern District of New York; that at no time prior to or since said thirtieth day of December, one thousand nine hundred and three, did he leave his home and known place of abode except for temporary absences, and never with intent to avoid or flee from detection or punishment for any offense against the United States, and that at no time named in said indictment and at no time since the thirtieth day of December, one thousand nine hundred and three, has this defendant been a fugitive from justice or in any way or manner whatsoever been fleeing from justice within the intent and meaning of section 1045 of the Revised Statutes of the United States.

VIII. That this defendant is ready to verify and prove the foregoing facts as this court shall direct and award, and that therefore he

pleads the same in bar of any prosecution, trial, or punishment under said indictment, and says that to prosecute or punish him under said indictment or for any alleged offense charged therein or in any of the counts thereof would be to deny him the protection, privilege, and immunity of the statute of the United States in such case made and provided.

Second. For a second and separate plea to each and every of the counts in said indictment contained this defendant avers:

I. That heretofore and on or about the ninth day of March, one thousand nine hundred and seven, the Pennsylvania Sugar Refining Company, being the same corporation as is mentioned and described in said indictment, by and through George H. Earle, its receiver, duly appointed as such by the Court of Common Pleas No. 4 for the county of Philadelphia and State of Pennsylvania, by two orders duly
62 made and entered respectively on the second and sixth days of October, one thousand nine hundred and six, as appears by Exhibit "A," hereto annexed and made part hereof, brought a suit in this court, namely, the Circuit Court of the United States for the Southern District of New York, against this defendant and said The American Sugar Refining Company, Henry O. Havemeyer (since deceased), John E. Parsons, Walter D. Robinson, George L. Twigg, and Morris J. Werner; that said suit was authorized and directed to be commenced and prosecuted by said Court of Common Pleas, and that it was brought under and in pursuance of section seven of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (c. 647, 26 Stat., 209), and section seventy-three of the act of Congress of August 27, 1894, entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes" (c. 349, 28 Stat., 509), for the purpose of recovering the sum of thirty million dollars, such sum being averred in the complaint in said suit to be threefold the damages alleged to have been sustained by said Pennsylvania Sugar Refining Company from being injured in its business and property by the defendants in said civil suit by reason of all and singular the acts, doings, and things averred in said indictment, all as will more fully and at large appear by reference to the amended complaint in said suit filed in the office of the clerk of this court on the twenty-second day of November, one thousand nine hundred and seven, which will be produced on the hearing of this plea, and of which a true copy is hereto annexed as Exhibit "B" and made a part hereof.

II. That such proceedings were thereupon had in said suit
63 that the issues were joined therein by the answers of the several defendants, including this defendant, which answers duly denied the material allegations of the complaint; that said issues were duly noticed and set for trial in said Circuit Court of the United States for the Southern District of New York on the twenty-sixth day of May, one thousand nine hundred and nine, and that in contemplation of and preparation for said trial, the plaintiff, said Pennsyl-

vania Sugar Refining Company, duly caused to be issued in due form in the name and teste of the Honorable Melville W. Fuller, the Chief Justice of the United States, under the seal of this court and signed by the clerk of this court, and caused to be duly served upon this defendant, a subpœna duces tecum addressed to and commanding him to bring and produce at the trial of said suit in this court certain documentary evidence, including the following documents, to wit:

"(1) The original agreement between Adolph Segal and Gustav E. Kissel, dated December 30th, 1903, being the same agreement as is alleged and set forth in said indictment.

"(2) The original consent of the Champion Construction Company indorsed on said agreement between said Segal and Kissel, dated December 30th, 1903, being the same consent as is alleged and set forth in said indictment.

"(3) The original proxy of the Champion Construction Company to Gustav E. Kissel, constituting the said Kissel its true and lawful attorney to vote upon 26,000 shares of stock of the Pennsylvania Sugar Refining Company, owned by the Champion Construction Company, dated December 30th, 1903, being the same proxy as is alleged and set forth in said indictment.

* * * * * * *

"(15) All books of account, letters, and writings, showing the accounts between and the pecuniary transactions between Gustav
64 E. Kissel and The American Sugar Refining Company between October 1, 1903, and September 1, 1906, and all returned cheques, drafts, and other vouchers showing the payments made by the said The American Sugar Refining Company to the said Kissel and by the said Kissel to the said The American Sugar Refining Company during the said period, directly or indirectly."

all as will more fully and at large appear by reference to the original subpœna which will be produced on the hearing of this plea, and of which a true copy is hereto annexed as Exhibit "C" and made a part hereof.

III. That thereafter said suit so brought against this defendant and others duly came on for trial at a term of said court held in this district before the Honorable George C. Holt and a jury, and thereupon and on the twenty-sixth day of May, one thousand nine hundred and nine, and for numerous days thereafter, and, in due obedience to said subpœna duces tecum and in submission to its compulsion and not otherwise, this defendant attended personally in court and brought with him and produced all and singular the documentary evidence described in said subpœna duces tecum, including the documents above described, and which are the same documents referred to in said indictment against this defendant so found on the first day of July, one thousand nine hundred and nine.

IV. That upon the trial of said suit before said Honorable George C. Holt and a jury and on or about the twenty-seventh day of May, one thousand nine hundred and nine, the counsel for the plaintiff, said Pennsylvania Sugar Refining Company, called upon this de-

fendant, who was then in court in person, to produce in pur-
65 suance of and in obedience to said subpœna duces tecum, the original agreement dated December 30, 1903, between Adolph Segal, called the borrower, and Gustav E. Kissel, as agent, his principals and their assigns, called the lenders, being the original and the only original of the agreement of the same tenor, purport, and effect as that referred to and purporting to be set out at length in said indictment so found against this defendant as "Overt act" No. 1, and therein averred to have been done in order to effect the object of the alleged conspiracy or conspiracies.

V. That this defendant by and through his counsel then and there declined and refused to produce any documents under said subpœna duces tecum so served upon this defendant as aforesaid unless he was put on the stand and sworn to produce them, and by and through his counsel contended that the statute of the United States in such case made and provided required such papers to be produced under oath, and that this meant that this defendant should go upon the stand and be sworn to produce the documents; but the court held that it was not necessary that the witness be put on the stand or sworn in order to require him to produce the papers mentioned in said subpœna, and overruled the objection of this defendant, so made by and through his counsel, and ordered, directed, and compelled him and his counsel to produce the documents which this defendant had been subpœnaed to produce as aforesaid.

VI. That thereupon, in obedience to such ruling of said court and in submission to its compulsion and not otherwise, this defendant produced under said subpœna duces tecum the following documentary evidence, among others, which was offered and read in evidence
66 against him by the said plaintiff, The Pennsylvania Sugar Refining Company, on said trial of said civil suit, to wit:

"(1) The original of the contract in writing dated December thirtieth, on thousand nine hundred and three, between Adolph Segal, called the borrower, and this defendant, Gustav E. Kissel, as agent, his principals and their assigns, called the lenders, purporting to be a contract between the parties named for the loan of $1,250,000 on specified collateral security.

"(2) The original of the document in writing dated December thirtieth, one thousand nine hundred and three, signed by the defendant, Thomas B. Harned, as president of the Champion Construction Company, purporting to be the consent of said company.

"(3) The original of the document in writing dated December thirtieth, one thousand nine hundred and three, signed in the name of the Champion Construction Company by the defendant, Thomas B. Harned, as president, purporting to be a proxy from said company to this defendant, Gustav E. Kissel.

"(4) The original of the letter dated New York, January 5th, 1904, to this defendant, Gustav E. Kissel, from the American Sugar Refining Company, purporting to hold said defendant harmless by

reason of the execution of said agreement of December thirtieth, one thousand nine hundred and three, between himself and said Segal."

And that these are the originals and the only existing originals of the documents of the same tenor, purport, and effect referred to and purporting to be set out at length in said indictment so found against this defendant as "Overt acts" Nos. 1, 2, 3, and 11, respectively, and therein alleged to have been signed, executed and procured in order to effect the object of the alleged conspiracy or conspiracies.

67 VII. That this defendant is ready to verify and prove the foregoing facts as this court shall direct and award, and that, therefore, he pleads the same in bar of any prosecution, trial, or punishment under said indictment, and says that to prosecute or punish him under said indictment or for any alleged offense charged therein or in any of the counts thereof would be to deny him the protection, privilege, and immunity of the statutes of the United States in such case made and provided.

Wherefore this defendant, said Gustav E. Kissel, prays judgment that this honorable court, by its proper entry of record, may dismiss and discharge him from prosecution, trial, and punishment under said indictment so found on the first day of July, one thousand nine hundred and nine, and now pending in this court against him, and from prosecution and trial for the alleged offenses in said indictment or in any of the counts thereof charged against him.

New York, July 29, 1909.

GUSTAV E. KISSEL,
By WILLIAM C. OSBORN,
His Attorney.
(Office and post-office address, 71 Broadway, New York City.)

We hereby certify that the foregoing pleas in bar are not interposed for delay and that in our opinion they are well founded in point of law.

New York, July 29, 1909.

WILLIAM D. GUTHRIE,
WILLIAM C. OSBORN,
Of Counsel for Defendant Kissel.

68 EXHIBIT "A" TO PLEAS IN BAR.

BABCOCK
vs.
PENNSYLVANIA SUGAR REFINING COMPANY.

Decree.

And now, October 2nd, 1906, upon consideration of the injunction affidavit filed herewith, it is ordered, adjudged and decreed, that an injunction shall forthwith issue restraining the Pennsylvania Sugar Refining Company, its officers and agents, from intermeddling with or in any manner disposing of the books, money, assets and property

of the said company until the further order of the court in the premises, security for said injunction first to be entered in $5,000.

R. N. W.

The motion to continue the injunction will be heard on Saturday, October 6th, 1906.

It is further ordered that George H. Earle, jr., be and is hereby appointed receiver to take immediate possession of the books, papers, money, assets, choses in action and property of every description belonging to the said company, security to be entered by the said receiver in the sum of $200,000.00.

R. N. W.

69 BABCOCK *vs.* PENNSYLVANIA SUGAR Refining Company. | C. P. No. 4. September term, 1906. No. 1563.

And now, to wit, October 6th, 1906, this cause coming on to be heard, upon motion to continue the injunction upon the proofs presented and due consideration thereof, it is ordered, adjudged and decreed that the injunction heretofore granted be and the same is hereby continued until further order.

R. N. W.

70 EXHIBIT "B" TO PLEAS IN BAR.

Amended complaint.

Circuit Court of the United States, Southern District of New York.

PENNSYLVANIA SUGAR REFINING COMPANY, plaintiff, *against* THE AMERICAN SUGAR REFINING COMPANY, HENRY O. Havemeyer, John E. Parsons, Gustav E. Kissel, Walter D. Robinson, George L. Twigg, and Morris J. Werner, defendants.

The plaintiff above named, complaining of the defendants, by Battle & Marshall, its attorneys, respectfully shows to the court, on information and belief:

I. The plaintiff is, and at all the times hereinafter mentioned was, a corporation organized, existing and authorized under and by virtue of the laws of the State of Pennsylvania. At all said times the plaintiff had a total authorized capital stock of five million dollars ($5,000,000), divided into fifty thousand shares (50,000) of the par value of $100 each. All of said stock had been issued and was outstanding in the hands of various parties.

71 II. The defendant, The American Sugar Refining Company, is, and at all the times hereinafter mentioned was, a corporation duly organized, existing and authorized under and by virtue of

the laws of the State of New Jersey. The said defendant is, and at all said times was, engaged in the business of purchasing and importing into the United States raw sugar and other articles and materials from which refined sugar is in whole or part manufactured, and in manufacturing, refining, and selling refined sugar, molasses, melada, and other like products. Its principal place of business in the State of New Jersey is and was in Jersey City, and its principal place of business out of the State of New Jersey is in the city of New York. It is, and at all said times was, largely and extensively engaged in carrying on its aforesaid business in the States of New York, Pennsylvania, Louisiana, California, Maryland, Connecticut, and other States. It is and was engaged in the operation of large and valuable plants in various States of the United States, and at all said times owned and controlled the capital stock of various corporations incorporated in various States and engaged in the business of buying, manufacturing, refining, and selling sugar, molasses, and melada, and other like products. It was also at all of said times engaged largely in the business of importing from the State of Louisiana, and from other States adjoining the Gulf of Mexico into Pennsylvania and various of the other States of the United States, cane sugar and other articles and materials from which refined sugar is manufactured, for the purpose of refining and manufacturing the same, and in causing the said raw sugar and other materials and articles, as well as the refined sugar, molasses, melada, and
72 other products to be transported between the several States and exported to foreign countries for the purpose of trade and commerce. By reason of the aforesaid facts, the defendant, The American Sugar Refining Company, did at all said times control a very large and important part of the cane sugar refining business in and throughout the United States of America.

III. At all the time hereinafter mentioned the defendant, Henry O. Havemeyer, was a director and the president of the defendant. The American Sugar Refining Company, and the defendant John E. Parsons was a director and vice-president and general counsel of the said The American Sugar Refining Company.

IV. That the plaintiff's sole business and occupation from 1883 until it ceased in 1898 to do business as herein below alleged has been interstate and foreign trade and commerce, viz, purchasing in foreign countries and in the State of Louisiana and other States of the United States cane or raw sugar, molasses, and other articles and materials used and employed in the manufacture of sugar and other products; the importation and transportation of the same from the said places of purchase into the State of Pennsylvania; the manufacture in the State of Pennsylvania of sugar and such products from such raw sugar and other articles and materials; and the sale of the sugar and products so manufactured in and their transportation to the State of New Jersey and other States and foreign countries. That the purchase of the cane or raw sugar, molasses, and other articles and materials as aforesaid, and the importation and

transportation of the same into the State of Pennsylvania;
73 the manufacture thereof into sugar and products aforesaid and the sale and the transportation of the same from said State of Pennsylvania into various other States of the United States and foreign countries, were all and inseparably comprised in the plaintiff's said business and occupation. And said business and occupation could not be carried on without such importation of raw sugar, articles, and materials into the State of Pennsylvania, the manufacture and refining thereof, as aforesaid, and the sale in and transportation of the sugar therefrom to other States and foreign countries. That the importation of said raw material was the first step in plaintiff's said business, and without it such business could not be commenced or carried on, nor could its refinery run, be operated, or do business. That at the time and times of the commission of the acts and grievances herein complained of plaintiff was the owner of valuable property, consisting, among other things, of a tract of land in the city of Philadelphia, State of Pennsylvania, together with a wharf on the Delaware River, and together also with railroad sidings, stations, and other fixtures connected with various railway lines leading to the States of Delaware, New Jersey, New York, Maryland, Ohio, West Virginia, and other States. Upon said tract of land the plaintiff had built, erected, completed, and equipped, ready for use and operation, in the month of December, 1903, an enlarged sugar refinery in the place and stead of a smaller refinery theretofore, to wit, about the year 1883, erected upon said land, and thereafter and until the beginning of 1898 run, used, and operated by the plaintiff in carrying on its said business. That when the war between the United
74 States and Spain began in 1898, the plaintiff ceased the importation of raw sugar, molasses, and other products, and ceased manufacturing or refining the same in said smaller refinery and trading in the articles so imported, manufactured, or refined, and did not thereafter resume such importation, manufacturing, refining, or trading. Subsequently, and in the year 1901, the former refinery owned by the plaintiff was torn down to make room for the present refinery, the building of which was commenced in or about the year 1901 and was completed in the year 1903.

For the purpose of erecting the new refinery the plaintiff necessarily brought and imported into the State of Pennsylvania from some other State or States of the United States large quantities of material, machinery, and other articles and things necessary for the construction of said refinery, which importation commenced in the year 1901 and continued until the completion of the refinery in 1903. That it was the intention and purpose of the plaintiff to resume and continue its said business of sugar manufacturing in its said enlarged refinery and to resume and continue to purchase in the State of Louisiana and other States of the United States and in foreign countries cane sugar, molasses, and other articles and materials and to resume and continue to import the same therefrom into the State of Pennsylvania and there to refine and manufacture the same as

aforesaid, and to resume and continue to sell and export refined sugar and other products when so manufactured from its said refinery into the States of New York, Maryland, Ohio, West Virginia, New Jersey, Delaware, and other foreign States and to thereby compete and continue to compete with the defendant, The American Sugar Refining Company, which said defendant was and is engaged in the
75 same business as plaintiff as hereinbefore more fully set forth. No cane or raw sugar which are essential and basic articles for the refining and manufacture to which the plant and refinery of the plaintiff is and was alone adapted are, or at any time were or could be grown or raised or produced in the State of Pennsylvania.

V. Prior to and in the month of December, 1903, one Adolph Segal, of the city of Philadelphia and State of Pennsylvania, controlled a majority of the stock of a certain corporation known as the Champion Construction Company; and the said Champion Construction Company had in its possession and under its control twenty-six thousand (26,000) shares of the capital stock of the plaintiff, being more than a majority of the outstanding stock of the plaintiff.

VI. The defendant, Gustav E. Kissel, is and was, at all of the times herein mentioned, a banker and broker doing business in the city of New York.

VII. All of the facts hereinbefore stated and alleged were well known and believed throughout the said month of December, 1903, and thereafter by the defendant The American Sugar Refining Company, and by the defendant Henry O. Havemeyer, and by the defendant John E. Parsons, and by the defendant Gustav E. Kissel.

VIII. And then and thereupon, on or about the 1st day of December, 1903, and at divers times thereafter in the city, county, and State of New York, and in the city and county of Philadelphia and State of Pennsylvania, and at other places, the defendants above named, and each of them, unlawfully and with unlawful intent and
76 purpose combined, conspired, confederated, and agreed together, to and with each other, and with divers persons to the plaintiff unknown, to prevent and restrain the plaintiff from engaging in business that would be competitive with the business then and there conducted by the defendant, The American Sugar Refining Company, and to prevent and restrain the plaintiff from engaging in trade and commerce with divers planters and merchants in the Republic of Cuba and other foreign countries, and with divers planters and merchants in the State of Louisiana and in other States adjoining the Gulf of Mexico, and to prevent and restrain the plaintiff from purchasing cane sugar and other articles and materials from which refined sugar is manufactured, in the said places, and bringing the same into the State of Pennsylvania, to be there manufactured and refined, and to prevent and restrain the plaintiff from transporting refined sugar from the plant of the plaintiff in the State of Pennsylvania into the States of New York, New Jersey, Delaware, Maryland, and other States and countries; all with the unlawful purpose and intent aforesaid.

IX. The defendants, and each of them, did and performed, among other things, the various acts hereinafter more fully described and set forth, to wit:

(a) On or about the 30th day of December, 1903, the defendant Kissel, personally and acting as agent for The American Sugar Refining Company, and the defendant Havemeyer induced the said Adolph Segal to accept from him, the said Kissel, a loan of one million two hundred and fifty thousand dollars ($1,250,000), and obtained a written agreement from the said Adolph Segal, a copy of which
77 said agreement is hereto attached as a part hereof and marked "Exhibit A," and on the same date the said defendant Kissel obtained from the said Champion Construction Company a consent to the said agreement, a copy of which said consent is hereto annexed as a part hereof and marked "Exhibit B." The said Kissel, at the time of entering into said agreement with said Adolph Segal, not only concealed his said agency from said Segal, but expressly denied such agency to said Segal, who was thereby deceived, misled, and induced to enter into said agreement.

(b) The defendant Parsons supervised and assisted in the preparation of the said agreement, and suggested, advised, and arranged the means and methods by which the control of the voting power of the stock of the plaintiff and the control of the property of the plaintiff should be transferred to and vested in the defendant Kissel; and to that end prepared, drafted, and formulated various papers and documents, and prepared and suggested the form of resolutions hereinafter described to be adopted by the new directors, provided for in the fourth subdivision or paragraph of said agreement, "Exhibit A," hereto.

(c) The defendant, The American Sugar Refining Company, prior to the time when the said Kissel obtained from the said Segal the said agreement, dated December 30th, 1903, had authorized and directed and instructed the said Kissel to obtain the said agreement, and in obtaining the said agreement the said Kissel acted as the authorized agent of the defendant, The American Sugar Refining Company. And thereafter, on or about the 10th day of January, 1907, in Jersey City, New Jersey, the said defendant, The American Sugar Re-
78 fining Company, pursuant to a vote of its stockholders, agreed to defend, protect, and indemnify the defendant Havemeyer and the defendant Parsons against any action that might be brought against the said Parsons or the said Havemeyer by reason of the facts averred and set forth in this complaint, or by reason of other acts done by the said defendant Parsons and the said defendant Havemeyer, in furtherance of the agreement hereinbefore referred to.

(d) On the 30th day of December, 1903, and in the city of Philadelphia and State of Pennsylvania, the defendants Kissel, Robinson, Twigg, and Werner each accepted office as director of the plaintiff herein, the said four individuals having been elected directors in place of other directors who had resigned, pursuant to the provisions of the

said subdivision fourth of said contract "Exhibit A" annexed to the complaint herein.

(e) On the 30th day of December, 1903, and in the city of Philadelphia and State of Pennsylvania, the said defendants Kissel, Robinson, Twigg, and Werner, as directors of the plaintiff as aforesaid, adopted a resolution which had been theretofore, in whole or in part, prepared for their adoption by the defendant Parsons, requiring that the refinery and plant owned by the plaintiff, as aforesaid, should not be run, and that no proceedings looking to the commencement of operations of the plant of the plaintiff should be taken until the further order of the board of directors of the plaintiff. The said defendants, Kissel, Robinson, Twigg, and Werner, then and there constituted a majority of the board; which majority, under the law governing this corporation, constituted the quorum of said board, by reason whereof the said four defendants acquired and unlawfully and fraudu-
79 lently exercised the control of the corporation and thus hampered and controlled the discretion vested by the law in such board solely for the benefit of the corporation, and which could not be lawfully used for its harm.

(f) Throughout all of said period of time the defendant Havemeyer was aiding, abetting, conferring with and advising the other defendants, and was furnishing funds and obtaining funds from or for the defendant, The American Sugar Refining Company, with which to make the loan provided for and called for in the contract hereto annexed as "Exhibit A," and had prior to December 30, 1903, authorized and directed the said Kissel to obtain, make, and enter into said agreement, "Exhibit A."

(g) From the said 30th day of December, 1903, the defendants, and each and all of them, have continually thereafter kept the plant of the plaintiff from being operated, and have kept and restrained the plaintiff from engaging in business, trade, and commerce, and from transporting sugar and other articles and materials from which refined sugar is manufactured from foreign countries and from the State of Louisiana and other States adjoining the Gulf of Mexico into the State of Pennsylvania for manufacturing and refining, and have prevented and restrained the plaintiff and its directorate, in the manner aforesaid and through the control which had been obtained by the said defendants over the directorate and property of the said plaintiff, from engaging in trade and commerce and from sending sugar for sale from the State of Pennsylvania into the States of New York, Delaware, West Virginia, and other States, for the pur-
80 pose of competing with the said The American Sugar Refining Company, and from using a free and untrammelled discretion and judgment in said respects.

X. Each and all of said acts described in the last paragraph hereof were done and performed by the defendants and each of them in pursuance of the said combination, conspiracy, confederation, and agreement, and to effect the objects and purposes thereof, and with

the unlawful intent and purpose as hereinbefore alleged. No part of said sum of one million two hundred and fifty thousand dollars ($1,250,000), referred to in "Exhibit A" hereto annexed, was borrowed, received, or in any way used for the benefit of the plaintiff. The five hundred first mortgage bonds of the Pennsylvania Sugar Refining Company, referred to in said "Exhibit A," were part of an issue of bonds of the plaintiff herein, secured by a mortgage upon the property of the plaintiff hereinbefore described.

XI. By reason of all the foregoing facts and of the said unlawful combination, agreement, confederation, and conspiracy, the plaintiff has been greatly injured, both in its business and property, and the business of the plaintiff has been utterly destroyed and ruined, and the property of the plaintiff has been caused to deteriorate and depreciate in value, and plaintiff has been wholly deprived of the use of its property and of large profits which could and would have been made by the plaintiff had the plaintiff not been prevented and restrained, as aforesaid, from engaging in a competitive business with The American Sugar Refining Company and from the use of its property and from trade and commerce with the said States
81 other than the State of Pennsylvania, and with the said foreign countries; and from having a free and untrammelled discretion in said respects; and by reason of said facts and matters hereinbefore set forth the plaintiff has been injured in its business and property in the sum of ten million dollars ($10,000,000).

Wherefore, the plaintiff demands judgment against the defendants, and each of them, jointly and severally, for the sum of thirty million dollars ($30,000,000), pursuant to the provisions of the laws of the United States in such case made and provided, and demands judgment further against the said defendants, and each of them, jointly and severally, for the costs of this suit, including a reasonable attorney's fee.

BATTLE & MARSHALL,
Attorneys for Plaintiff, 37 Wall Street, New York City.

UNITED STATES OF AMERICA,
Southern District of New York, County of New York, ss.:

George Gordon Battle, being duly sworn, deposes and says that he is one of the attorneys for the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That the reason why this verification is made by the deponent instead of by the plaintiff is that the plaintiff is a corporation
82 incorporated under the laws of the State of Pennsylvania; and that none of its officers are within this district, where deponent resides and has his place of business; and that the sources of deponent's information and the grounds of his belief are derived

from inspection of numerous documents and books and statements made to him by various persons.

GEO. GORDON BATTLE.

Sworn to before me this 22d day of November, 1907.

ROGER B. WOOD,
[SEAL.] *Notary Public, N. Y. Co.*

EXHIBIT "A."

Agreement made December thirtieth, nineteen hundred and three (1903), by and between Adolph Segal, herein called the borrower, and Gustav E. Kissel, as agent, his principals and their assigns, being herein called the lenders, witnesseth:

Whereas the borrower desires to borrow one million two hundred and fifty thousand dollars ($1,250,000) from the lenders upon the terms and conditions hereof and of a stock note to be given therefor, of which the following is a copy:

$1,250,000. NEW YORK.

Twelve months after date, for value received, I promise to pay to Gustav E. Kissel, agent, or his assigns, one million two hundred and fifty thousand dollars ($1,250,000), with interest at six per cent. per annum, payable quarterly on April 2nd, July 2nd, October 2nd,
83 and January 2nd, having deposited with him as collateral security for payment of this or any other liability or liabilities to his principals or their assigns, due or to become due, or that may be hereafter contracted, the following property, to wit:

One thousand first mortgage bonds of $1,000 each of the Majestic Apartment House Co., Philadelphia; five hundred first mortgage bonds of $1,000 each of the Pennsylvania Sugar Refining Company; receipt of Frank K. Hipple for twenty-six thousand (26,000) shares of the capital stock of the Pennsylvania Sugar Refining Company, the right to the stock and all voting and other rights which belong to it, with full power and authority, in case of the nonpayment of the said sum of money at maturity, or of either or any of the instalments of interest as they shall become payable, to sell the whole or any part of such securities at any broker's board or at public or private sale, at his or their option, at any times or times thereafter without advertisement or notice to me, and with the right on his or their part to become purchasers thereof at such sale or sales freed and discharged of any equity of redemption, and after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made to pay the said indebtedness, or so much thereof as shall remain unpaid, and whether due or to become due, returning the overplus, if any, to the undersigned, and I will still remain liable for any amount unpaid.

This note, with the securities, may be transferred by the said Gustav E. Kissel, agent, his principals, or by his or their assigns, the holder at any time to have all the rights herein conferred upon him and them, with no remaining or continuing liability of transferrer.

84 And whereas a substantial part of the security therefor consists in the said five hundred (500) $1,000 bonds of the Pennsylvania Sugar Refining Company, and the right to the said twenty-six thousand (26,000) shares of the stock of that company, and the voting and other powers which belong to that stock, the borrower hereby covenanting that the same has been regularly issued as full paid stock and constitutes a majority of all the stock of the company, with the control thereby given.

Now, therefore, the parties have agreed, and they hereby do agree, as follows:

1. The borrower, that the said bonds of the Majestic Apartment House Co. are the entire issue of such bonds, and that they are secured by a first mortgage of the property known as the Majestic Apartment House, in Philadelphia; that the borrower will furnish to the lenders a policy of title insurance issued by the Real Estate Trust Company of Philadelphia insuring the title to the property as free and clear of and from all prior liens and incumbrances, and insuring the validity of the mortgage as legally executed to be a first lien thereon.

2. The borrower, as the Majestic Apartment House is not yet completed, agrees that the lenders may retain and withhold two hundred thousand dollars ($200,000) of the said loan, to be paid over in monthly instalments of fifty thousand dollars ($50,000) each, upon certificates by the architect that the amount has, in addition to all previous payments, been expended upon the property, the last fifty thousand dollars ($50,000) not be paid over until the Majestic Apartment House is fully completed, free from all claims for

85 taxes, mechanics' liens, claims by contractor, and other claims whatsoever, such two hundred thousand dollars ($200,000) to be deposited in the U. S. Mortgage and Trust Company of New York, to remain until the borrower shall be entitled to receive the same or shall be in default, he to have the trust company interest thereon, in case of any default the lenders to be entitled to a return of so much of the same as shall remain and to allow for the same.

3. The borrower agrees that the entire issue of first mortgage bonds of the Pennsylvania Sugar Refining Company is three million dollars ($3,000,000), and no more, consisting in three thousand bonds, each of one thousand dollars ($1,000); the said five hundred bonds (500) being one-sixth of the total authorized issue, and that such issue is secured by a first mortgage of the property of the Pennsylvania Sugar Refining Company; that the borrower will furnish the lenders a policy of title insurance issued by the Real Estate Trust Company of Philadelphia, insuring the title to the property as free and clear of all prior liens and incumbrances, and insuring the va-

lidity of the mortgage as legally executed so as to be a first lien thereon.

4. The borrower agrees that he will so arrange that the absolute voting power for the said twenty-six thousand (26,000) shares of the stock of the Pennsylvania Sugar Refining Company shall be in the lenders; that the lenders shall have the right to use such voting power as may be suitable to aid or effectuate the purposes hereof; and as the control thereby given is a material part of the consideration for the said note, the borrower further agrees that he will so
86 arrange that, of the seven directors of the said Pennsylvania Sugar Refining Company, four to be nominated by the lenders, of whom one shall be the said Gustav E. Kissel, shall be put in place of four of the present directors, that they, or substitutes to be nominated by the lenders, shall be directors so long as any part of the loan shall remain unpaid; that the control and possession of the property of the said Pennsylvania Sugar Refining Company shall be in such way and so effectually subjected to the control of the board of directors that so long as the note, or any part thereof, remains unpaid, the refinery of the said the Pennsylvania Sugar Refining Company shall only be run or operated or do business as shall be directed by such board of directors; any expense caused by the possession of the property or in carrying out this agreement on the part of the lenders to be added to the said note and to be entitled to the security and to the benefit of all the provisions on the part of the borrower therein contained with like effect as if the same had been specially mentioned therein.

5. The borrower may pay the said note with unpaid interest to time of payment at any time after October 1st, 1904, and not before.

6. The lenders agree that upon compliance with the foregoing provisions on the part of the borrower they will, upon the terms herein, and in the said note contained, make the said loan.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

GUSTAV E. KISSEL, *Agent.* [SEAL.]
ADOLPH SEGAL. [SEAL.]

87 EXHIBIT "B."

DECEMBER 30, 1903.

The Champion Construction Company hereby consents and agrees that the 26,000 shares of the capital stock of the Pennsylvania Sugar Refining Company, mentioned in the foregoing papers, shall be used as therein provided.

THE CHAMPION CONSTRUCTION COMPANY.
THOMAS B. HARNED, *President.*
ADOLPH SEGAL, *Treasurer.* [SEAL.]
WM. H. WHITESIDE, *Secretary.*

88 EXHIBIT "C" TO PLEAS IN BAR.

The President of the United States of America to Gustav E. Kissel, [L. S.] *37 Wall St. & Morristown, N. J., Greeting:*

We command you, That all business and excuses being laid aside, you appear and attend before the judges of the Circuit Court of the United States of America for the Southern District of New York, at a Circuit Court to be held at the U. S. Court building, in the city of New York, in and for the said district of New York, on the 26 day of May, 1909, at 11 o'clock in the forenoon, to testify and give evidence in a certain action now pending undetermined in the Circuit Court of the United States for the Southern District of New York, between Pennsylvania Sugar Refining Company, plaintiff, and The American Sugar Refining Company et als., defendants, on the part of the plaintiff, and that you bring with you and produce at the time and place aforesaid a certain

"(1) The original of a certain agreement between Adolph Segal and Gustav E. Kissel, dated December 30th, 1903.

"(2) The original consent of Champion Construction Company endorsed on said agreement between said Segal and Kissel, dated December 30th, 1903.

"(3) Proxy of Champion Construction Company to Gustav E. Kissel, constituting the said Kissel its true and lawful attorney to vote upon 26,000 shares of stock of the Pennsylvania Sugar Refining Company, owned by the Champion Construction Company, dated December 30th, 1903.

89 "(4) Original letter dated Philadelphia, Pa., December 30th, 1903, written by Frank K. Hipple, voting trustee, to Thomas B. Harned.

"(5) Original assignment and transfer by the Champion Construction Company to Gustav E. Kissel, or his assigns, of said last-named letter from said Frank K. Hipple, voting trustee, to Thomas B. Harned.

"(6) Original of a certain agreement between Adolph Segal and Gustav E. Kissel, of date February 1st, 1904, referring to the said agreement between said Segal and Kissel, dated December 30th, 1903.

"(7) Original of a certain agreement between Adolph Segal and Gustav E. Kissel, of date February 2d, 1904, referring to the said agreement between said Segal and Kissel, dated December 30th, 1903.

"(8) Two letters dated a few days prior to July 26th, 1905, from John E. Parsons to Gustav E. Kissel.

"(9) One letter dated on July 26th, 1905, from John E. Parsons to Gustav E. Kissel.

"(10) A letter dated on or a few days prior to May 15th, 1905, from John E. Parsons to Gustav E. Kissel.

"(11) Original letter from Adolph Segal to the defendant Kissel, dated on or about December 30th, 1903, containing an agreement to pay to the said Kissel $100,000 commission, and purporting to assign

to him 1,300 shares of the stock of the plaintiff company, Pennsylvania Sugar Refining Company.

"(12) Original letter from the defendant Segal to the defendant Kissel, dated May 4th, 1904, and all other letters from said Segal to said Kissel, prior or subsequent thereto.

"(13) Original letter from John E. Parsons to Gustav E. Kissel, dated December 30th, 1903, enclosing with said letter a memorandum entitled 'Mem. re Segal loan.'

90 "(14) All books of account, agreements, notes, obligations, letters, and writings showing the accounts between and the pecuniary transactions between Gustav E. Kissel and the said Adolph Segal or the various corporations controlled by him between October 1st, 1903, and September 1st, 1906, and all returned cheques, drafts, and other vouchers showing the payments made by the said Kissel to the said Segal, directly or indirectly, between and including the said October 1st, 1903, and September 1st, 1906, and by the said Segal to the said Kissel during the same period, and all agreements, notes, and obligations of Adolph Segal or the various corporations controlled by him.

"(15) All books of account, letters, and writings, showing the accounts between and the pecuniary transactions between Gustav E. Kissel and The American Sugar Refining Company between October 1, 1903, and September 1, 1906, and all returned cheques, drafts, and other vouchers showing the payments made by the said The American Sugar Refining Company to the said Kissel and by the said Kissel to the said The American Sugar Refining Company during the said period, directly or indirectly.

"(16) A stock note delivered by the said Adolph Segal to the said Gustav E. Kissel, dated on or about December 30th, 1903, in the amount of $1,250,000, and all title insurance policies covering the title to the property of the Majestic apartment house in the city of Philadelphia and of the sugar refinery of the Pennsylvania Sugar Refining Company in the city of Philadelphia.

"(17) All reports concerning the said Majestic Apartment House Company and concerning the said sugar refinery of the Pennsylvania Sugar Refining Company in the city of Philadelphia received by the defendant Kissel from one R. L. Ashurst, an attorney-at-

91 law, of Philadelphia, Pa., between October 1st and December 30th, 1903.

"(18) All reports of examinations made by experts or others of the said sugar refinery of the Pennsylvania Sugar Refining Company in the city of Philadelphia, and of the said Majestic apartment house property in the said city of Philadelphia, and received by the said defendant Kissel between the 1st day of October and the 30th day of December, 1903.

"(19) The originals of all letters received by the defendant Gustav E. Kissel from John E. Parsons, Henry O. Havemeyer, and the said The American Sugar Refining Company relative to the loan of

$1,250,000 purported to have been made by the said Kissel as agent or individually to the said Segal or the corporations controlled by him on or about December 30th, 1903, and at any other times between October 1st, 1903, and September 1st, 1906, and all letter press or other copies of all letters written by the said Kissel on the same subject to the said John E. Parsons, Henry O. Havemeyer, and The American Sugar Refining Company to cover the period between and including October 1st, 1903, and September 1st, 1906.

"(20) The originals of all letters or memoranda written by the said Kissel to the said Segal between and including October 1st, 1903, and September 1st, 1906.

"(21) The originals of all letters, telegrams, obligations, or memoranda written by one Frank K. Hipple to the said Gustav E. Kissel between October 1st, 1903, and September 1st, 1906, and the letter-press or other copies of the letters, telegrams, obligations, or memoranda written by the said Kissel to the said Hipple between the same dates.

"(22) The original of a certain bond of indemnity executed, or caused to be executed, by the defendant The American Sugar
92 Refining Company, or others in its behalf, to the said Gustav E. Kissel, indemnifying him, the said Kissel, against any damage which he might sustain by entering into the transaction evidenced by the agreement between himself as agent and Adolph Segal, dated on or about December 30th, 1903.

" (23) The original of a certain letter dated Philadelphia, on or about December 30, 1903, from the president of the Pennsylvania Sugar Refining Company to the said Gustav E. Kissel.

" Wherever originals are called for by this subpœna duces tecum, and originals are not in the possession of the person commanded to produce the originals, such person is hereby commanded to produce letter-press or other copies of such originals."

now in your custody, and all other deeds, evidences and writings, which you have in your custody or power concerning the premises. And for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit two hundred and fifty dollars in addition thereto.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the city of New York, the 10 day of May, 1909.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jul. 29, 1909. John A. Shields, clerk.

93 United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA, PLAINTIFF,
versus
THOMAS B. HARNED, IMPLEADED WITH THE AMERICAN Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, and Gustav E. Kissel, defendants. | Plea in bar.

And now, the said Thomas B. Harned comes into court in his own proper person and by counsel, and having heard read the indictment against him in the above entitled proceeding, found on the first day of July, 1909, says that the United States ought not further prosecute the said indictment against him, and for plea in bar, to each and every of the alleged offences therein charged, he respectfully states as follows, to wit:

First. That all of the alleged offences charged against this defendant in said indictment are barred by the provisions of section 1044 of the Revised Statutes of the United States of America, because said indictment, and each and every count thereof, was not found within the three years next after the offences, or any of them therein alleged, was committed.

Second. That for more than three years next preceding the finding of said indictment on the first day of July, 1909, this defendant has not committed or attempted to commit or participate in any of the offences alleged in said indictment, and has not committed any
94 act against the peace and dignity of the United States alleged in the said indictment, or contrary to the form of the statute of the same in such case made and provided. That more than three years had elapsed between the commission of the offenses alleged in said indictment and each of them and the finding of said indictment. That defendant has not within the period of three years next preceding the finding of said indictment done any act or thing, or committed any overt act, directly or indirectly in pursuance or ratification of or to effect or tending to effect the object of any conspiracy or in furtherance of any offenses set forth in said indictment, or any count thereof.

Third. That for more than three years next preceding the said first day of July, 1909, this defendant was not a member of and did not engage or participate in any conspiracy or conspiracies in restraint of trade or commerce among the several States or with foreign nations, alleged in the several counts of said indictment; that within said period of three years he did not, directly or indirectly, do any act or thing whatsoever in aid or furtherance of or to effect or tending to effect the object of any conspiracy or conspiracies in restraint of such trade or commerce; that the acts and things alleged in said indictment to have been done within said period of three years by others, were not acts or things in aid or furtherance of or to effect or tending to effect the object of any such conspiracy or conspiracies,

and the said alleged overt acts, being alleged therein as overt acts Nos. 13, 14, 15, 16, 17, and 18 were not done with defendant's knowledge or consent, participation, agreement, authority, or ratification.

Fourth. That for more than three years next preceding the finding of said indictment, this defendant has not
95 monopolized or attempted to monopolize, or combined or conspired with any other person or persons to monopolize, and has not done any act or thing whatsoever to monopolize or tending to monopolize the trade or commerce among the several States or with foreign nations, or any part thereof, alleged in said indictment or in any count thereof.

Fifth. That for more than three years next preceding the finding of said indictment, this defendant was not a member of and did not engage or participate in any conspiracy or conspiracies to monopolize any part of the trade or commerce among the several States or with foreign nations, alleged in the several counts of said indictment; that within said period of three years he did not, directly or indirectly, do any act or thing whatsoever in aid or furtherance of or to effect or tending to effect the object of any such conspiracy or conspiracies to monopolize such trade; that the acts and things alleged in said indictment to have been done within said period of three years by others were not acts or things in aid or furtherance of or to effect or tending to effect the object of any such conspiracy or conspiracies to monopolize said trade or commerce, and that the said alleged overt acts or any of them were not done with defendant's participation, knowledge, consent, agreement, authority, or ratification.

Sixth. That at all the times mentioned in said indictment and until the present time, and at all times since the thirtieth day of December, one thousand nine hundred and three, this defendant was subject to the process of this court, and has been and still is an inhabitant and resident of the city of Philadelphia, in the State of Pennsylvania, where he has resided with his family; that at
96 all such times he has been continuously engaged in the practice of law in the city of Philadelphia and has been present there almost daily; that at no time prior to or since said thirtieth day of December, one thousand nine hundred and three, did he leave his home and known place of abode except for temporary absences and never with intent to avoid or flee from detection or punishment for any offense against the United States, and that at no time named in said indictment and at no time since the thirtieth day of December, one thousand nine hundred and three, has this defendant been a fugitive from justice, or in any way or manner whatsoever been fleeing from justice within the intent and meaning of section 1045 of the Revised Statutes of the United States or otherwise.

Seventh. That this defendant is ready to verify and prove the foregoing facts as this court shall direct and award, and prays the judgment of the court if he should be put to further answer this indictment, and pleads the said facts in bar of any prosecution, trial,

or punishment under said indictment, and says that to prosecute or punish him under said indictment or for any alleged offense charged therein or in any of the counts thereof would be to deny him the protection, privilege, and immunity of the statute of the United States in such case made and provided.

Wherefore this defendant, said Thomas B. Harned, prays judgment that this honorable court, by its proper entry of record, may dismiss and discharge him from prosecution, trial, and punishment under said indictment so found on the first day of July, one thousand nine hundred and nine, and now pending in this court against him, and from prosecution and trial for the alleged offences in said in-
97 dictment or in any of the counts thereof charged against him.

New York, August 3rd, 1909.

THOMAS B. HARNED,
By HUNT, HILL & BETTS, *his Attorneys.*
(Office and post-office address, 165 Broadway, New York.)

I hereby certify that the foregoing plea in bar is not interposed for delay and that in my opinion it is well founded in point of law.

New York, August 3rd, 1909.

LEAVITT J. HUNT,
Of Counsel for Defendant.
THOMAS B. HARNED.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Aug. 3, 1909. John A. Shields, clerk.

98 *Demurrer to Deft. Kissel's first plea.*

United States Circuit Court for the Southern District of New York.

THE UNITED STATES OF AMERICA, PLAINTIFF,
against
AMERICAN SUGAR REFINING COMPANY, GUSTAV E. KISSEL, and others, defendants.

Now comes the United States of America, by Henry A. Wise, United States attorney for the Southern District of New York, and demurs to the defendant Gustav E. Kissel's first separate plea to each and every count in the indictment herein for the following reason, to wit, that the facts as set forth therein in effect constitute a plea of not guilty.

Wherefore the United States of America demands judgment that the plea is insufficient in law and be overruled, and that the Government have such other and further relief as to the court may seem proper.

HENRY A. WISE,
United States Attorney in and for the Southern District of New York, Attorney for the United States, Plaintiff.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Sep. 22, 1909. John A. Shields, clerk.

99 *Demurrer to defendant Harned's plea.*

United States Circuit Court for the Southern District of New York.

THE UNITED STATES OF AMERICA, PLAINTIFF,
against
AMERICAN SUGAR REFINING COMPANY,
Thomas B. Harned and others, defendants.

Now comes the United States of America, by Henry A. Wise, United States attorney for the southern district of New York, and demurs to the plea filed herein August 3, 1909, by the defendant Thomas B. Harned, for the following reason, to wit, that the facts as set forth therein in effect constitute a plea of not guilty.

Wherefore the United States of America demands judgment that the plea is insufficient in law and be overruled, and that the Government have such other and further relief as to the court may seem proper.

HENRY A. WISE,
United States Attorney in and for the Southern District of New York, Attorney for the United States, Plaintiff.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Sep. 22, 1909. John A. Shields, clerk.

100 United States Circuit Court for the Southern District of New York.

THE UNITED STATES OF AMERICA, PLAINTIFF,
against
AMERICAN SUGAR REFINING COMPANY,
Gustav E. Kissell and others, defendants.
Joinder in demurrers.

And now comes the said Gustav E. Kissel, and says that his first and second separate pleas herein, and each of them, and the matters therein contained in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the United States from prosecuting the said indictment against him, the said Gustav E. Kissel; and he is ready to verify and prove the same as this honorable court shall direct and award.

New York, September 30, 1909.

GUSTAV E. KISSEL,
By WILLIAM C. OSBORN, *his Attorney*,
(Office and post-office address, 71 Broadway, New York City.)

A copy of the within paper has been this day received at this office. Sep. 30, 1909.

HENRY A. WISE, *U. S. Attorney.*

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Sep. 30, 1909. John A. Shields, clerk.

101 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
versus
GUSTAV E. KISSEL, IMPLEADED WITH American Sugar Refining Company et al., defendants.

SIR: You will please take notice that the special demurrer heretofore filed by the United States of America to the first separate plea of the Defendant Kissel to each and every count in the indictment in the above entitled proceeding will be brought on for argument at the same time as the argument to the demurrer to the second separate plea herein, and that a motion will then be made for judgment that said plea is sufficient in law and be maintained.

Dated New York, October 4, 1909.

WILLIAM C. OSBORN,
Attorney for Defendant Kissel,
71 Broadway, New York City.

To HENRY A. WISE,
United States Attorney for the Southern District of New York.
(Office and post-office address, room 50, U. S. Court and P. O. building, Borough of Manhattan, city of New York.)

102 United States Circuit Court for the Southern District of New York.

THE UNITED STATES OF AMERICA
versus
GUSTAV E. KISSEL AND THOMAS B. Harned, impleaded with The American Sugar Refining Company and others, defendants.

Henry A. Wise, United States attorney; Charles F. Brown, John W. H. Crim, and James R. Knapp, of counsel; William D. Guthrie and William Church Osborn, for Defendant Kissel; George Whitefield Betts, jr., for Defendant Harned.

HOLT, *J.*:

These are demurrers filed by the Government to pleas in bar interposed by the defendants Kissel and Harned to the indictment. The indictment charges the defendants with a conspiracy in restraint of interstate commerce, in violation of the act of July 2, 1890, commonly called the Sherman Act. The defendants are The American Sugar Refining Company and its directors, and certain other persons. The indictment alleges, in substance, that the defendants conspired to prevent the Pennsylvania Sugar Refining Company
103 from doing business. It is alleged that this result was accom-

plished; that the Defendant Kissel, acting secretly as agent of The American Sugar Refining Company, made a contract to loan to Adolph Segal $1,250,000 upon a note of Segal's, secured by certain collateral, among which collateral were 26,000 shares, being a majority of the stock of the Pennsylvania Sugar Refining Company; that having thus obtained such majority of the stock, a new board of directors, in the interest of The American Sugar Refining Company, was elected; that said board immediately voted to close the refinery of the Pennsylvania Sugar Refining Company; and that it has since done no business. The defendants Kissel and Harned have pleaded, in bar of the prosecution, the statute of limitations, and the Defendant Kissel has also pleaded in bar that, having produced on the trial of a civil action certain documents tending to prove certain facts necessary to be proved in this case, he is entitled to immunity from prosecution under this indictment. Admittedly the general three years' statute of limitations for crimes not capital, contained in section 1044 of the U. S. Revised States, applies in this case. It is also conceded that the execution of the contract between Kissel and Segal, by which the loan was made and the control of a majority of the stock of the Pennsylvania Company obtained, the consent of the Champion Construction Company to the pledge of the stock, the power of attorney by that company to Kissel, the election of the new directors, the meeting of the new board, at which the vote was passed that the Pennsylvania Sugar Refining Company should thereafter refrain from carrying on business until the further order of said board, the ad-
104 vance of $1,250,000 by The American Sugar Refining Company to Kissel, and the loan of that amount by Kissel to Segal were all done, and the entire transaction closed in all respects on or before January 4, 1904. Therefore, the offense alleged in this indictment was complete, and this indictment might have been brought on January 5, 1904. The indictment was not filed until July 1, 1909, more than five years after the time when the alleged conspiracy was entered into and its object entirely accomplished. Obviously, therefore, the statute of limitations is a bar to this prosecution unless the crime charged in the indictment is a continuing offense, or acts have occurred which have renewed the offense and started again the running of the statute.

A conspiracy, in its legal sense, is a misdemeanor at common law. It has been defined as an agreement by two or more persons to do an illegal act, or to do a legal act by illegal methods. Such a conspiracy, if entered into, could be criminally punished at common law, whether any act in furtherance of it was done or not. Sec. 5440 of the U. S. Revised Statutes provides that if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to criminal punishment. Under this statute a mere conspiracy is not an offense, but, in addition to the con-

spiracy, one or more of the parties to it must do some act to effect its object before a criminal prosecution can be maintained.

The first section of the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with
105 foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor." The second section of the act provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor." This indictment is necessarily brought under these provisions of the Sherman Act. No indictment can be brought in the United States courts for the offense of conspiracy at common law, because it has not been made an offense by any United States statute. Nor could this indictment have been brought under sec. 5440 of the U. S. Revised Statutes, because there is no law of the United States making a conspiracy in restraint of trade, or to monopolize trade, an offense against the United States, except the Sherman Act, and there cannot be a conspiracy to engage in a conspiracy. Under the Sherman Act no overt act is necessary to the commission of the offense. That provides that every person who engages in a conspiracy in restraint of trade or commerce, or to monopolize trade, is guilty of the offense. The question in this case, therefore, is when the statute of limitations begins to run in an indictment for conspiracy under the Sherman Act.

The law of conspiracy has been the subject of a great deal of over-refined discussion, and the authorities upon the subject are quite conflicting. Some hold a conspiracy to be an offense complete when entered into and upon which the statute of limitations immediately begins to run. Others hold it to be a continuing offense, from which it is argued that the statute of limitations never begins to run
106 against a conspiracy until it is abandoned and whatever result has been accomplished by it annulled. The Government's counsel, upon the argument, claimed that the defendant, having once entered upon the conspiracy and closed the refinery of the Pennsylvania Company, continued to be engaged in the conspiracy every day so long as the refinery was closed. It would follow from this position that the only way in which the defendants could start the statute of limitations running would be to rescind the vote to close the refinery, have the directors friendly to The American Sugar Company resign, and deliver back to the original holders the stock taken as collateral. No authorities have been cited sustaining such a position. Most of the cases cited have arisen in prosecutions based upon sec. 5440, under which the indictment must not only charge the conspiracy, but one or more overt acts. Some authorities hold that the statute of limitations begins to run in such prosecutions as soon as one overt act has been committed, and that, if more acts in furtherance of the con-

spiracy are performed, that does not stop the running of the statute. (United States v. Owen, 32 Fed., 534; United States v. McCord, 72 Fed., 159; Ex parte Black, 147 Fed., 832; United States v. Biggs, 157 Fed., 264.) Other cases hold, in substance, that each additional overt act starts the statute running anew. (United States v. Bradford, 148 Fed., 413; Ware v. United States, 154 Fed., 577; United States v. Brace, 149 Fed., 874.)

In Ware v. United States (154 Fed., 577) it is held that there cannot be a conviction upon the original conspiracy and overt acts which have taken place more than three years before the finding of the indictment; that there must be proved a conspiracy within the three years, as well as an overt act, and that although the original
107 conspiracy is competent evidence upon the question whether a new or continuing conspiracy has been entered into within the three years, it alone is insufficient to prove such new conspiracy. See also United States v. Black, 160 Fed., 431.

These decisions were all made in other districts. With entire respect for the judges making them, it is impossible to harmonize them. In my opinion, the cases which hold that the statute begins to run after the first overt act, and is not stopped by subsequent overt acts in pursuance of the same conspiracy, take the correct view.

But in any event the decisions under sec. 5440 of the U. S. Revised Statutes are not strictly applicable to this prosecution. The word conspiracy is usually employed with a sinister meaning, but, in my opinion, as used in the Sherman Act, it has substantially the same meaning as the word contract. A conspiracy in restraint of trade is nothing but a contract or agreement between two or more persons in restraint of trade. If this indictment had charged, in the language of the act, that the defendants had made a contract in restraint of trade, I suppose no one would claim that the statute of limitations did not begin to run upon the execution of the contract. How can the Government impose a different liability on the defendants by calling the same thing a conspiracy? I think that the offense was complete in this case when the contract between Kissel and Segal was made. It was unquestionably complete before January 5, 1904, before which date the contract was carried out in all respects, and the object of the alleged conspiracy accomplished. If, however, the doctrine of that class of cases which hold that each new overt act constitutes a new offense, in prosecutions under sec. 5440, were to be followed in this case, the overt acts alleged to have occurred within
108 three years, necessary to constitute a new offense, must be acts which have a tendency to carry out the object of the conspiracy, or in some way tend to make it effectual (United States v. McLaughlin, 169 Fed., 307; United States v. Black, 160 Fed., 431); and each defendant must have participated intentionally in an overt act done within the three years prior to the indictment (Ware v. United States, 154 Fed., 579). So far as the defendant Harned is concerned, he had nothing to do with any overt act alleged in the indictment after December 30, 1903. As to the defendant Kissel, the overt acts alleged in

the indictment as occurring within three years before it was filed, in my opinion, are not acts which had any tendency to carry out the object of the conspiracy, or to make it effectual. The overt acts so alleged are certain resolutions adopted by the directors of The American Sugar Refining Company, agreeing to indemnify the president and counsel for any liability in the Segal matter, certain letters written by one of the defendants to the secretary of The American Sugar Refining Company, and a bill for disbursements rendered by the defendant Kissel to The American Sugar Refining Company, all in the year 1907. In my opinion these alleged overt acts had no tendency to accomplish the object of the conspiracy. The object was completely accomplished before January 5, 1907. One of the letters, dated February 15, 1907, alleged in the indictment as an overt act, shows that the question whether criminal proceedings should be brought had been under consideration by the Department of Justice before that time, but it took no action until this indictment was filed.

The case of United States v. Irvine (98 U. S., 450), although that was not a prosecution for a conspiracy, seems to me to state the
109 principle applicable to such a case better than any other authority that has been cited. In that case an indictment was found for a violation of the act making it a misdemeanor for a pension agent to wrongfully withhold from a pensioner the whole or any part of the pension due to him. The indictment was brought more than three years after the pension money had been received by the pension agent and demanded from him by the pensioner. The trial court held that the offense prohibited by the statute was a continuing offense, and that so long as the defendant continued to withhold the pension money the offense was not barred by the statute of limitations. The Supreme Court overruled that decision. Mr. Justice Miller, in the opinion, says:

"There is in this but one offense. When it is committed, the party is guilty and is subject to criminal prosecution, and from that time, also, the statute of limitations applicable to the offense begins to run. It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when perhaps the pensioner is dead. * * * He pleads the statute, * * * which was made for such a case as this: but the reply is, You received the money. You have continued to withhold it these twenty years; every year, every month, every day was a withholding within the meaning of the statute.

"We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired the crime is complete, and from that day the statute of limitations begins to run against the prosecution."

There seems to be an increasing tendency in recent years for public prosecutors to indict for conspiracies when crimes have been
110 committed. A conspiracy to commit a crime may be a sufficiently serious offense to be properly punished; but when a crime has been actually committed by two or more persons, there is

usually no proper reason why they should be indicted for the agreement to commit the crime instead of for the crime itself. A large class of federal prosecutions for commercial offenses, such, for instance, as violations of the interstate-commerce act, the Sherman Act, the bankrupt act, the acts relating to public lands, and many others, now habitually take the form of indictments for conspiracies to commit crimes, the actual commission of which is also usually alleged in the indictment. Prosecutors seem to think that by this practice all statutes of limitations and many of the rules of evidence established for the protection of persons charged with crime can be disregarded. But there is no mysterious potency in the word conspiracy. If a conspiracy to commit a crime has been carried out, and the crime committed, the crime, in my opinion, cannot be made something else by being called a conspiracy. The men who have committed the crime are liable to whatever penalties the law imposes, and to whatever protection the law affords. If the statute of limitations is a bar to a prosecution for the crime, that bar, in my opinion, cannot be lifted by a prosecution for a conspiracy to commit that crime. Statutes of limitations are beneficial statutes. The interests of the community and justice to persons charged with crime require that offenses be promptly prosecuted. Statutes of limitations should be given a plain and sensible construction. Their effect should not be frittered away by a strained interpretation, based on subtle and refined reasoning. The Government has waited, before bringing this prosecution, for five years and a half after the alleged offense was com-
111 plete, and, in my opinion, the statute of limitations is a bar to this indictment.

This conclusion makes it unnecessary to consider the doubtful question raised by the plea of immunity interposed by the defendant Kissel.

The ground of demurrer that the plea in bar of the statute of limitations will not lie because the plea is, in substance, a plea of not guilty, seems to me, if I correctly understand it, wholly untenable. The defense of the statute of limitations could be raised on the trial under the general plea of not guilty, but it can also be raised by a special plea before the trial.

The demurrers to the pleas in bar interposed by the defendants Kissel and Harned are overruled, and judgment dismissing the indictment as to said defendants may be entered.

October 26, 1909.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Oct. 26, 1909. John A. Shields, clerk.

112 *Order for judgment.*

At a stated term of the United States Circuit Court for the Southern District of New York, duly held in the Post-Office building, Bor-

ough of Manhattan, city of New York, on the ninth day of November, 1909.

Present: Hon. George C. Holt, judge.

THE UNITED STATES OF AMERICA
versus
GUSTAVE E. KISSEL AND THOMAS B. HARNED, impleaded with The American Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, and John E. Parsons, defendants.

An indictment against the defendants above named having been found and filed by the grand jurors in and for the Southern District of New York on the first day of July, 1909, and the defendants having been thereupon severally arraigned, and the defendants Kissel and Harned having thereafter interposed special pleas in bar on the ground that the said indictment had not been found within three years next after the offenses charged in the indictment or any of them had been committed, and the United States having interposed and filed its demurrer to each of said special pleas, and the said defendants having served joinders in demurrer and noticed the issues on said demurrers and joinders for argument, and said issues having duly come on to be heard; and after hearing Henry A. Wise, United States attorney for the Southern District of New York, and Charles F. Brown, special counsel for the United States, in support
113 of said demurrers, and William D. Guthrie, of counsel for the defendant Kissel, and George Whitefield Betts, junior, of counsel for the defendant Harned, in opposition thereto and in support of said several pleas, and the court having taken the same under advisement and duly considered said issues and being fully advised in the premises;

Now, on motion of William Church Osborn, as attorney for the defendant Kissel, and Hunt, Hill & Betts, as attorneys for the defendant Harned, it is

Ordered that said demurrers so interposed by the United States to said special pleas be, and the same hereby are, severally overruled, and that said pleas be severally sustained as sufficient in law; and it is

Further ordered that judgment be entered overruling the several demurrers of the United States to said pleas and each of them and sustaining said pleas and each of them as sufficient in law and dismissing as to said defendants Kissel and Harned the indictment so found and filed on July first, 1909.

GEO. C. HOLT, J.

Approved as to form, Nov. 9, 1909.

HENRY A. WISE,
United States Attorney.
HUNT, HILL & BETTS,
Attys. for Deft. Harned.
WM. CHURCH OSBORN,
Atty. for Deft. Kissel.

114 *Judgment.*

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA *versus* GUSTAV E. KISSEL AND THOMAS B. Harned, impleaded with The American Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, and John E. Parsons, defendants.	Judgment overruling demurrers to special pleas and dismissing indictment as to defendants Kissel and Harned. Dated November 9th, 1909.

An indictment against the defendants above named having been found and filed by the grand jurors in and for the Southern District of New York on the first day of July, 1909, and the defendants having been thereupon severally arraigned, and the defendants Kissel and Harned having thereafter interposed special pleas in bar on the ground that the said indictment had not been found within three years next after the offenses charged in the indictment or any of them had been committed, and the United States having interposed and filed its demurrer to each of said special pleas, and the said defendants having served joinders in demurrer and noticed the issues on said demurrers and joinders for argument, and said issues having duly come on to be heard and been heard; and the court having taken the same under advisement and been fully advised in the premises, and having overruled said demurrers and sustained said pleas as sufficient in law, and directed judgment to be accordingly entered dismissing the indictment as to said defendants;

Now, on motion of William Church Osborn, as attorney for the defendant Kissel, and Hunt, Hill & Betts, as attorneys for the defendant Harned, it is

115 Ordered and adjudged that the demurrers interposed by the United States to said special pleas be, and the same hereby are, severally overruled; that said pleas be, and the same hereby are, severally sustained as sufficient in law, and that the indictment so found and filed July first, 1909, against the defendants above named be, and the same hereby is, dismissed as to the defendants Gustav E. Kissel and Thomas B. Harned.

JOHN A. SHIELDS, *Clerk.*

Approved as to form, Nov. 9, 1909.

HENRY A. WISE,
United States Attorney.
WM. CHURCH OSBORN,
Atty. for Deft. Kissel.
HUNT, HILL & BETTS,
Attys. for Deft. Harned.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Nov. 9, 1909. John A. Shields, clerk.

116 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
v.
GUSTAV E. KISSEL AND THOMAS B. HARNED, impleaded with American Sugar Refining Co. and others, defendants.

GENTLEMEN: You will please take notice that a motion will be made before the Hon. George C. Holt, at the term of the United States Circuit Court for the Southern District of New York, to be held in and for the said district in the Post-Office building in the Borough of Manhattan, in the city of New York, on the 19th day of November, 1909, at 11.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for a resettlement of the order and judgment entered in the above entitled proceeding on November 9, 1909, so as to read in the manner and form hereto annexed.

Dated New York, Nov. 16th, 1909.

HENRY A. WISE,
U. S. Attorney, Attorney for the United States.
(Office & P. O. address, Room 50, P. O. bldg., Borough of Manhattan, city of New York.)

To WILLIAM CHURCH OSBORN, Esq.,
Atty. for the Deft. Kissel, 71 Broadway, City.
Messrs. HUNT, HILL & BETTS,
Attys. for Deft. Harned, 165 Broadway, City.

117 *Order resettling order of judgment.*

At a stated term of the United States Circuit Court for the Southern District of New York held in the Post-Office building in the Borough of Manhattan, city of New York, in said district, on the 24th day of November, 1909.

Present: Hon. George C. Holt, judge.

UNITED STATES OF AMERICA
v.
GUSTAV E. KISSEL AND THOMAS B. HARNED, impleaded with American Sugar Refining Co. and others, defendants.

Upon reading the order of this court in the above entitled action made and entered November 9, 1909, and the judgment entered thereon on said last mentioned date in the office of the clerk of this court, and upon reading and filing the notice of motion for this order dated November 16, 1909, and proof of the service thereof upon the attorneys for the defendants Kissel and Harned, and upon motion

of Henry A. Wise, United States attorney for the United States herein, it is

Ordered that the said order made and entered November 9, 1909, and the judgment entered thereon November 9, 1909, be and the same hereby are resettled and amended so that the said order and judgment shall read as follows:

118 At a stated term of the United States Circuit Court for the Southern District of New York, duly held in the post-office building, Borough of Manhattan, city of New York, on the 19th day of November, 1909.

Present: Hon. George C. Holt, judge.

THE UNITED STATES OF AMERICA
versus
GUSTAV E. KISSEL AND THOMAS B. HARNED, Impleaded with The American Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, and John E. Parsons, defendants.

An indictment against the defendants above named having been found and filed by the grand jurors in and for the Southern District of New York on the first day of July, 1909, and the defendants having been thereupon severally arraigned and the defendants, Kissel and Harned, having thereafter interposed special pleas in bar on the ground that the said indictment had not been found within three years next after the offense charged in the indictment or any of them had been committed, and the United States having interposed and filed its demurrer to each of said special pleas, and the said defendants having served joinders in demurrer and noticed the issues on said demurrers and joinders for argument, and the United States having also moved that the said special plea of defendant

119 Harned be treated as a plea of not guilty, and said issues having duly come on to be heard; and after hearing Henry A. Wise, United States attorney for the Southern District of New York, and Charles F. Brown, special counsel for the United States, in support of said demurrers, and William D. Guthrie, of counsel for the defendant Kissel, and George Whitefield Betts, junior, of counsel for the defendant Harned, in opposition thereto and in support of said several pleas, and the court having taken the same under advisement and duly considered said issues and being fully advised in the premises;

Now, on motion of William Church Osborn, as attorney for the defendant Kissel, and Hunt, Hill & Betts, as attorneys for the defendant Harned, it is

Ordered that said demurrers so interposed by the United States to said special pleas be, and the same hereby are, severally overruled and that said pleas be severally sustained as sufficient in law; and it is

Further ordered that said motion be denied; and it is

Further ordered that judgment be entered overruling the several demurrers of the United States to said pleas and each of them and sustaining said pleas and each of them as sufficient in law and dismissing as to said defendants Kissel and Harned the indictment so found and filed on July first, 1909.

GEORGE C. HOLT, *Judge.*

120 *Judgment.*

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA,
versus
GUSTAV E. KISSEL AND THOMAS B. Harned, impleaded with The American Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, and John E. Parsons, defendants.

Judgment overruling demurrers to special pleas and dismissing indictment as to defendants Kissel and Harned. Dated November 9, 1909.

An indictment against the defendants above named having been found and filed by the grand jurors in and for the Southern District of New York on the first day of July, 1909, and the defendants having been thereupon severally arraigned and the defendants Kissel and Harned having thereafter interposed special pleas in bar on the ground that the said indictment had not been found within three years next after the offenses charged in the indictment or any of them had been committed, and the United States having interposed and filed its demurrer to each of said special pleas and the said defendants having served joinders in demurrer and noticed the issues on said demurrers and joinders for argument, and the United States having also moved that the said special plea of defendant Harned be treated as a plea of not guilty, and said issues having duly come on to be heard and been heard; and the court having taken the same under advisement and been fully advised in the premises and having overruled said demurrers and sustained said plea as sufficient
121 in law, and directed judgment to be accordingly entered dismissing the indictment as to said defendants;

Now, on motion of William Church Osborn, as attorney for the defendant Kissel, and Hunt, Hill & Betts, as attorneys for the defendant Harned, it is

Ordered and adjudged that the demurrers interposed by the United States to said special pleas be, and the same hereby are, severally overruled; that said pleas be, and the same hereby are, severally sustained as sufficient in law, and that the said motion be denied, and that the indictment so found and filed July first, 1909, against the

defendants above named be and the same hereby is dismissed as to the defendants Gustav E. Kissel and Thomas B. Harned.

[L. S.] JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. Circuit Court, Southern District of N. Y. Filed Nov. 27, 1909. John A. Shields, clerk.

122 *Notice of motion and affidavit.*

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA
against
GUSTAV E. KISSEL AND THOMAS B. HARNED, impleaded with The American Sugar Refining Company and others, defendants.

You will please take notice that on the annexed affidavit of William Church Osborn, the defendants Kissel and Harned will apply to this court in the United States Post-Office building, on Wednesday, the 15th day of December, 1909, at 10.30 a. m., or as soon thereafter as counsel can be heard, for an order nunc pro tunc, directing the clerk of this court to insert in the record of this case as the same is to be transmitted to the Supreme Court of the United States under and in pursuance of the writ of error heretofore allowed the plaintiff by this court, a certificate substantially in the words following:

"This is to certify that the order and judgment of November 9th, 1909, in the above entitled cause, overruling the demurrers to the special pleas in bar of the defendants Kissel and Harned were settled upon due notice to the United States and approved as to form by its attorney, and were subsequently and on November 19th, 1909, re-settled upon application of the United States, and that at no time prior to the entry of said order and judgment or to the resettlement thereof, was any suggestion made by the United States to the
123 court that it did not intend and elect to stand on its demurrer, but desired to be permitted to plead over and traverse the special pleas in bar, nor was an application or motion at any time made to the court for leave to plead over and traverse the allegations of the defendants' special pleas in bar."

New York, December 14, 1909.

(Signed) WM. CHURCH OSBORN,
Attorney for Defendant Kissel.

(Signed) HUNT, HILL & BETTS,
Attorneys for Defendant Harned.

To HENRY A. WISE, Esq.,
United States Attorney,
Post-Office Building, N. Y. City.

124 United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA
against
GUSTAV E. KISSEL AND THOMAS B. HARNED, impleaded with The American Sugar Refining Company and others, defendants.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

WILLIAM CHURCH OSBORN, being duly sworn, deposes and says:

1. I am the attorney in the above action for the defendant Gustav E. Kissel.

2. The defendant Kissel, on July 29th, 1909, duly filed two special pleas in bar interposing the defense of the statute of limitations and the defense of immunity, and the defendant Harned, on August 3rd, 1909, duly filed a similar special plea interposing the defense of the limitation. Thereafter, and on the 22nd day of September, 1909, the United States filed demurrers to each of said pleas, whereupon said defendants duly filed joinders in demurrer and duly noticed the issues of law upon such demurrers for argument before this court. The said issues of law came on for argument in this court on October 8th, 1909, and counsel were heard on behalf of the United States in support of said demurrers, and on behalf of the defendants Kissel and Harned in opposition thereto. The court subsequently filed an opinion, in which it held and directed that said demurrers be overruled and that judgment dismissing the indictment as to said defendants be entered, and declared that this conclusion made it un-

125 necessary to consider the question raised by the plea of immunity interposed by the defendant Kissel and the demurrer thereto. Thereafter, and on November 4th, 1909, the defendants Kissel and Harned served upon the United States a proposed order and judgment, which were noticed for presentation to the court and settlement on November 8th, 1909, but which presentation and settlement were adjourned at the request of the United States until November 9th, 1909, when the order and judgment were entered, and the United States attorney in writing approved the form of the order and judgment. Thereafter, and on November 16th, 1909, the United States served a notice of motion to have the judgment and order amended in respect to a motion which the United States had made to treat the special plea of the defendant Harned as a plea of not guilty, and on November 19th, 1909, such application was argued before the court, and thereupon, on motion of the United States, an amended order and amended judgment were entered on said November 19th, 1909.

3. Thereafter, and on the 8th day of December, 1909, the United States presented to the court a petition for a writ of error, alleging among other things that error had happened as assigned in the assignment of errors therewith submitted to the court, and thereupon this

court granted the petition for writ of error. In such assignment of errors so presented with said petition for writ of error it is assigned, in eight separate assignments stated in various forms, that the court erred in sustaining the plea of the defendants Kissel and Harned setting up the defense of the statute of limitations and in dismissing the indictment as to them without permitting the United
126 States to plead over and traverse said pleas, and without requiring the defendant to prove the facts alleged in said pleas.

4. Deponent further states that at no time prior to the assignment of errors on December 8th, 1909, was any suggestion made by or on behalf of the United States that it did not elect to stand on its demurrer, or that it desired to be permitted to plead over and traverse the allegations of said special pleas in bar, and that so far as the said defendants or their attorneys are informed, no suggestion, application, or motion has at any time been made to the court or to the said defendant or their attorneys for leave or permission so to plead over and traverse.

(Signed) WILLIAM CHURCH OSBORN.

Subscribed and sworn to before me this 14th day of December, 1909.

(Signed) RICHARD V. GREENE,
Notary Public, N. Y. Co.

(Endorsed:) A copy of the within paper has been this day received at this office. Dec. 14, 1909. Henry A. Wise, U. S. attorney. U. S. Circuit Court, Southern District N. Y. Filed Dec. 17, 1909. John A. Shields, clerk.

127 *Order for certificate nunc pro tunc as of November 29, 1909.*

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA
against
GUSTAV E. KISSEL AND THOMAS B. HARNED, impleaded with The American Sugar Refining Company and others, defendants.

On the annexed notice of motion and affidavit of William Church Osborn, verified December 13, 1909, it is

Ordered that the clerk be, and he hereby is, directed to file as part of the record of the above entitled suit, nunc pro tunc as of the 24th day of November, 1909, being the date when the order and judgment herein were re-settled on motion of the United States, this order certifying as follows, namely, that the order and judgment dated November 9th, 1909, in the above entitled cause, overruling the demurrer to the special pleas in bar of the defendants Kissel and Harned were settled upon due notice to the United States and approved as to form by its attorney; that they were subsequently and on November 24th,

1909, re-settled upon application of the United States; that at no time prior to the entry of said order and judgment or to the re-settlement thereof, as aforesaid, was any suggestion made by the United States to the court or to the defendants' attorneys that the United States did not intend and elect to stand on its demurrer, but desired to be permitted to plead over and traverse the special pleas in bar, and that no application or motion was at any time made to the court by the United States for leave to plead over and traverse the allegations of the defendants' special pleas in bar.

New York, December 17, 1909.

GEO. C. HOLT, *J.*

128 (Endorsed:) U. S. Circuit Court, Southern District of N. Y. Filed Dec. 17, 1909. John A. Shields, clerk.

129 United States Circuit Court, Southern District of New York, Second Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
GUSTAV E. KISSEL AND THOMAS B. HARNED, IMPLEADED with others, defendants.

Assignment of errors.

The United States of America, in connection with its petition for a writ of error, makes the following assignment of errors, which, it avers, occurred in the decision and order for judgment, and in the judgment of the court herein, sustaining the special pleas in bar of the defendants, Gustav E. Kissel and Thomas B. Harned, and quashing, setting aside, and dismissing, and sustaining demurrers to, the indictment herein, as to those defendants, to wit:

(NOTE.—Assignment No. 2 is the same as assignment No. 1, except that it refers to Defendant Harned, while No. 1 refers to Defendant Kissel. This is true as to each couple of assignments following Nos. 1 and 2, except that assignments 19 and 20 differ in another respect, and assignment No. 10½, referring to Defendant Harned, is single.)

130 1.

In view of the charges contained in the indictment in this case, the court erred in sustaining, by its decision and judgment, the first separate special plea in bar of the defendant, Gustav E. Kissel, filed July 29, 1909, setting up the statute of limitations.

2.

In view of the charges contained in the indictment in this case, the court erred in sustaining, by its decision and judgment, the special

plea in bar of the defendant, Thomas B. Harned, filed August 3, 1909, setting up the statute of limitations.

3.

The court erred in construing the indictment in this case as being an indictment charging only the making of a contract in restraint of trade and commerce among the several States and with foreign nations, within the meaning of the act of Congress approved July 2, 1890, and thereupon sustaining the first separate special plea in bar of the defendant Kissel, on the ground that the indictment was not found within three years after the making of such contract.

4.

The court erred in construing the indictment in this case as being an indictment charging only the making of a contract in restraint of trade and commerce among the several States and with foreign nations, within the meaning of the act of Congress approved July 2, 1890, and thereupon sustaining the special plea in bar of the defendant Harned, on the ground that the indictment was not found within three years after the making of such contract.

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5.

The court erred in holding that by reason of the setting out in that part of the indictment where overt acts are specified of a certain contract, dated December 30, 1903, between one Adolph Segal and the defendant Gustav E. Kissel, the indictment in legal effect charged only the making, by all the defendants, of a contract in restraint of trade and commerce among the several States and with foreign nations within the meaning of said act of Congress, and in thereupon sustaining the first separate plea of the defendant Kissel setting up the three year statute of limitations in bar of his prosecution under the indictment.

6.

The court erred in holding that by reason of the setting out in that part of the indictment where overt acts are specified of a certain contract, dated December 30, 1903, between one Adolph Segal and the defendant Gustav E. Kissel, the indictment in legal effect charged only the making, by all the defendants, of a contract in restraint of trade and commerce among the several States and with foreign nations within the meaning of said act of Congress, and in thereupon sustaining the special plea of the defendant Harned setting up the three year statute of limitations in bar of his prosecution under the indictment.

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7.

The court erred in not construing the indictment in this case as being one sufficiently charging the defendant with engaging in conspiracies in restraint of trade and commerce among the several States and with foreign nations, the monopolizing, attempting to monopolize and the conspiring together to monopolize, such trade and commerce, during the three years next preceding the finding and presentation of the indictment in this case, within the meaning of said act of Congress, and in not overruling the first separate special plea of the defendant Kissel setting up the three year statute of limitations in bar of his prosecution under the indictment.

8.

The court erred in not construing the indictment in this case as being one sufficiently charging the engaging in conspiracies in restraint of trade and commerce among the several States and with foreign nations, the monopolizing, attempting to monopolize and conspiring of the defendants together to monopolize, such trade and commerce, during the three years next preceding the finding and presentation of the indictment in this case, within the meaning of the said act of Congress, in not overruling the special plea of the defendant Harned setting up the three year statute of limitations in bar of his prosecution under the indictment.

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9.

The court erred in overruling the special demurrer filed by the United States to the first separate special plea in bar of the defendant Kissel setting up the statute of limitations, and in sustaining said special plea as being sufficient in law, instead of sustaining said special demurrer and overruling said special plea for the reason that said special plea amounted to a plea of not guilty and was therefore bad as a special plea in bar.

10.

The court erred in overruling the special demurrer filed by the United States to the special plea in bar of the defendant Harned setting up the statute of limitations, and in sustaining said special plea as being sufficient in law, instead of sustaining said special demurrer and overruling said special plea for the reason that said special plea amounted to a plea of not guilty and was therefore bad as a special plea in bar.

10½.

The court erred in sustaining, as being a sufficient plea of the statute of limitations to the indictment in this case, the special plea in bar of the defendant Harned, and in denying the motion made by

the United States for an order directing that said plea be treated as a plea of not guilty, instead of granting said motion on the ground that said plea amounted to a plea of not guilty.

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11.

The court erred in overruling the special demurrer filed by the United States to the first separate special plea in bar of the defendant Kissel setting up the statute of limitations, and in sustaining said special plea as being sufficient in law, instead of overruling said special plea for the reason that it was double, in that it attempted to combine a plea of the statute of limitations with a plea of not guilty.

12.

The court erred in overruling the special demurrer filed by the United States to the special plea in bar of the defendant Harned setting up the statute of limitations, and in sustaining said special plea as being sufficient in law, instead of overruling said special plea for the reason that it was double, in that it attempted to combine a plea of the statute of limitations with a plea of not guilty.

13.

The court erred in sustaining the first separate special plea in bar of Defendant Kissel and immediately thereupon dismissing the indictment in this case as to that defendant without permitting the United States to traverse said plea upon the overruling of the special demurrer of the United States to said plea.

14.

The court erred in sustaining the special plea in bar of Defendant Harned and immediately thereupon dismissing the indictment in this case as to that defendant without permitting the United States to traverse said plea upon the overruling of the special demurrer of the United States to said plea.

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15.

Having overruled the special demurrer of the United States to the first separate plea in bar of Defendant Kissel, the court erred in immediately, and without permitting the United States to traverse the same, and without requiring said defendant to prove the facts therein stated to be true, sustaining said special plea.

16.

Having overruled the special demurrer of the United States to the special plea in bar of Defendant Harned, the court erred in immedi-

ately, and without permitting the United States to traverse the same, and without requiring said defendant to prove the facts therein stated to be true, sustaining said special plea.

17.

Having overruled the special demurrer of the United States to the first separate special plea in bar of Defendant Kissel on the ground that said plea was not bad as being a plea amounting to a plea of not guilty, the court erred in thereupon treating that plea as though the facts set up in it had been proven by said defendant and immediately sustaining said plea instead of merely sustaining said plea as being a good and sufficient plea in law of the statute of limitations and permitting the United States to traverse the same or otherwise plead further.

136 18.

Having overruled the special demurrer of the United States to the special plea in bar of Defendant Harned on the ground that said plea was not bad as being a plea amounting to a plea of not guilty, the court erred in thereupon treating that plea as though the facts set up in it had been proven by said defendant and immediately sustaining said plea instead of merely sustaining said plea as being a good and sufficient plea in law of the statute of limitations and permitting the United States to traverse the same or otherwise plead further.

19.

The court erred in sustaining the first separate special plea of Defendant Kissel, setting up the statute of limitations in bar, on the ground that the overt acts set forth in the indictment as having been committed by him within the three years next preceding the finding of the indictment by the grand jury were not acts having a "tendency to carry out the object of the conspiracy or to make it effectual."

20.

The court erred in sustaining the special plea of Defendant Harned, setting up the statute of limitations in bar, on the ground that no overt act was set forth in the indictment as having been committed by him within the three years next preceding the finding of the indictment by the grand jury.

21.

The court erred in sustaining the first separate special plea of Defendant Kissel, setting up the statute of limitations in bar, on the ground that the offenses charged in the indictment were completed more than three years before the finding of the indictment by the grand jury.

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22.

The court erred in sustaining the special plea of Defendant Harned, setting up the statute of limitations in bar, on the ground that the offenses charged in the indictment were completed more than three years before the finding of the indictment by the grand jury.

23.

The court erred in not overruling the first separate special plea of Defendant Kissel, setting up the statute of limitations in bar, on the ground that the indictment in this case sufficiently charged the defendants with the offenses of engaging in conspiracies in restraint of trade and commerce among the several States and with foreign nations, of monopolizing and attempting to monopolize, and conspiring together to monopolize, such trade and commerce, within the three years next preceding the finding of the indictment; and on the ground that the United States would not be confined at the trial to proving only the overt acts set forth in the indictment, or to proving the continuation of those offenses by proving the committing of overt acts by the defendants or by any of them, or prevented from proving that the overt acts set forth in the indictment in fact had a "tendency to carry out the object of the conspiracy or make it effectual" even though they may not on their face show such tendency; and on the ground, also, that in a case like this where an overt act is charged in the indictment to have been committed by any defendant at any time after the inception of a continuing offense the United States would not be required, at the trial, to prove the committing by each or any defendant, within the three years next preceding
138 the finding of the indictment, of any overt act, but might prove the charges in the indictment by any evidence showing the continuation of the offense or the conscious participation of each defendant, within the three years next preceding the finding of the indictment, in a continued offense, instead of sustaining said plea as it did.

24.

The court erred in not overruling the special plea of Defendant Harned, setting up the statute of limitations in bar, on the ground that the indictment in this case sufficiently charged the defendants with the offenses of engaging in conspiracies in restraint of trade and commerce among the several States and with foreign nations, of monopolizing and attempting to monopolize, and conspiring together to monopolize, such trade and commerce, within the three years next preceding the finding of the indictment; and on the ground that the United States would not be confined at the trial to proving only the overt acts set forth in the indictment or to proving the continuation of those offenses by proving the committing of overt acts by the defendants or by any of them, or prevented from proving that the

overt acts set forth in the indictment in fact had a "tendency to carry out the object of the conspiracy or make it effectual," even though they may not on their face show such tendency; and on the ground, also, that in a case like this where an overt act is charged in the indictment to have been committed by any defendant at any time after the inception of a continuing offense, the United States would not be required, at the trial, to prove the committing by each or any defendant, within the three years next preceding the finding of
139 the indictment, of any overt act, but might prove the charges in the indictment by any evidence showing the continuation of the offense or the conscious participation of each defendant, within the three years next preceding the finding of the indictment, in a continued offense, instead of sustaining said plea as it did.

25.

The offenses charged in the several counts of the indictment in this case being in their nature continuing offenses, and all the defendants, including the defendant Kissel, being charged in terms therein with committing said offenses continuously throughout the period of six years next preceding the finding and presentation of the indictment by the grand jury, the court erred in sustaining as being sufficient in law the first separate special plea filed by said Defendant Kissel on July 29, 1909, seeking to bar his prosecution under said indictment by reason of the fact alleged in said plea that said indictment was not found within three years next after the offense therein charged was committed, and by reason of the provisions of section 1044 of the Revised Statutes of the United States.

26.

The offenses charged in the several counts of the indictment in this case being in their nature continuing offenses, and all the defendants, including the defendant Harned, being charged in terms therein with committing said offenses continuously throughout the period of six years next preceding the finding and presentation of the
140 indictment by the grand jury, the court erred in sustaining as being sufficient in law the special plea filed by said Defendant Harned on August 3, 1909, seeking to bar his prosecution under said indictment by reason of the fact alleged in said plea that said indictment was not found within three years next after the offense therein charged was committed, and by reason of the provisions of section 1044 of the Revised Statutes of the United States.

27.

The court erred in sustaining the first separate special plea in bar of the defendant Kissel on the ground that the overt acts set forth in the indictment showed that the indictment did not charge the

commission by the defendant of any offense within the three years next preceding the finding of the indictment by the grand jury, instead of overruling said plea on the ground that the overt acts set forth in the indictment could not be referred to by the court for the purpose of determining whether any offense was sufficiently charged in such indictment, or for the purpose of contradicting the allegations in those parts of the indictment in which the offenses therein charged are described.

141 28.

The court erred in sustaining the special plea in bar of the defendant Harned on the ground that the overt acts set forth in the indictment showed that the indictment did not charge the commission by the defendants of any offense within the three years next preceding the finding of the indictment by the grand jury, instead of overruling said plea on the ground that the overt acts set forth in the indictment could not be referred to by the court for the purpose of determining whether any offense was sufficiently charged in such indictment, or for the purpose of contradicting the allegations in those parts of the indictment in which the offenses therein charged are described.

29.

The court erred in holding that in legal effect the facts stated in the indictment showed only violations of that provision in the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat., 209), which denounces the making of contracts in restraint of trade and commerce among the several States and with foreign nations, and in thereupon accordingly sustaining the first separate special plea in bar of Defendant Kissel as sufficiently showing that the indictment was not found within three years next after such offenses were severally committed.

142 30.

The court erred in holding that in legal effect the facts stated in the indictment showed only violations of that provision in the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat., 209), which denounces the making of contracts in restraint of trade and commerce among the several States and with foreign nations, and in thereupon accordingly sustaining the special plea in bar of Defendant Harned as sufficiently showing that the indictment was not found within three years next after such offenses were severally committed.

31.

The court erred in treating as a general demurrer the first separate special plea of Defendant Kissel seeking to bar prosecution of the in-

dictment in this case as to him by reason of the fact alleged in said plea that said indictment was not found within three years next after the offense therein charged was committed, and by reason of the provisions of section 1044 of the Revised Statutes of the United States, and sustaining such demurrer to said indictment upon a construction of the statute upon which the same was founded such that the court held as a matter of law that said statute, it being the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," was applicable to the facts stated in the indictment only as said act denounces the making of contracts in restraint of trade and commerce among the several States and with foreign nations, such offenses not being continuing offenses in their nature, and not as it denounces the continuing offenses of engaging in conspiracies in restraint of such trade
143 and commerce, and of monopolizing and attempting to monopolize such trade and commerce, and of the conspiring of persons and corporations together to monopolize the same, in terms charged in the indictment.

32.

The court erred in treating as a general demurrer the special plea of Defendant Harned, seeking to bar prosecution of the indictment in this case as to him by reason of the fact alleged in said plea that said indictment was not found within three years next after the offense therein charged was committed, and by reason of the provisions of section 1044 of the Revised Statutes of the United States, and sustaining such demurrer to said indictment upon a construction of the statute upon which the same was founded such that the court held as a matter of law that said st*a*'ute, it being the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," was applicable to the facts stated in the indictment only as said act denounces the making of contracts in restraint of trade and commerce among the several States and with foreign nations, such offenses not being continuing offenses in their nature, and not as it denounces the continuing offenses of engaging in conspiracies in restraint of such trade and commerce, and of monopolizing and attempting to monopolize such trade and commerce, and of the conspiring of persons and corporations together to monopolize the same, in terms charged in the indictment.

144 33.

The court erred in treating as a general demurrer the first separate special plea in bar of Defendant Kissel and sustaining such demurrer and dismissing the indictment upon a construction of the statute upon which the indictment was founded, to the effect that the word conspiracy as used in that statute has substantially the same meaning as the word contract.

34.

The court errred in treating as a general demurrer the special plea in bar of Defendant Harned and sustaining such demurrer and dismissing the indictment upon a construction of the statute upon which the indictment was founded, to the effect that the word conspiracy, as used in that statute, has substantially the same meaning as the word contract.

35.

Having so treated as a general demurrer the first separate special plea in bar of the defendant, Kissel, the court erred in not overruling such demurrer upon a construction of said statute upon which the indictment was founded, involving and holding as a matter of law that said statute was applicable to the facts stated in the indictment, as said statute denounces the continuing offenses charged in the indictment of engaging in conspiracies in restraint of trade and commerce among the several States and with foreign nations, of monopolizing and attempting to monopolize such trade and commerce, and of the conspiring of persons and corporations together to monop-
145 olize the same, instead of upon a construction of said statute involving the holding as matter of law that said statute was applicable to the facts so stated in the indictment only as it denounces the making of contracts in restraint of trade and commerce among the several States and with foreign nations.

36.

Having so treated as a general demurrer the special plea in bar of the defendant, Harned, the court erred in not overruling such demurrer upon a construction of said statute upon which the indictment was founded involving the holding as a matter of law that said statute was applicable to the facts stated in the indictment as said statute denounces the continuing offenses charged in the indictment of engaging in conspiracies in restraint of trade and commerce among the several States and with foreign nations, of monopolizing and attempting to monopolize such trade and commerce and of the conspiring of persons and corporations together to monopolize the same, instead of upon a construction of said statute involving the holding as matter of law that said statute was applicable to the facts so stated in the indictment only as it denounces the making of contracts in restraint of trade and commerce among the several States and with foreign nations.

37.

Having so treated as a general demurrer the first separate special plea in bar of Defendant Kissel, the court erred in not over-
146 ruling such demurrer as being a demurrer merely raising a

question as to the running of the statute of limitations, which question cannot be raised by demurrer.

38.

Having so treated as a general demurrer the special plea in bar of Defendant Harned, the court erred in not overruling such demurrer as being a demurrer merely raising a question as to the running of the statute of limitations, which question cannot be raised by demurrer.

39.

In looking at the whole record, upon the filing of the special demurrer of the United States to the first separate special plea in bar of Defendant Kissel, in order to ascertain which party was first in fault, the court erred in rendering its decision and judgment dismissing, quashing, and setting aside the indictment in this case upon a construction of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (it being the statute upon which said indictment was founded) such that the court held as a matter of law that such statute was applicable to the facts stated in the indictment only as it denounces the making of contracts in restraint of trade and commerce among the several States and with foreign nations, such offenses not being continuing offenses in their nature, and not as it denounces the continuing offenses of engaging in conspiracies in restraint of such trade and commerce, and the monopolizing of, and attempting to monopolize, and conspiring of persons and corporations together to monopolize the same, in said statute mentioned and in terms charged in said indictment.

147 40.

In looking at the whole record, upon the filing of the special demurrer of the United States to the special plea in bar of Defendant Harned, in order to ascertain which party was first in fault, the court erred in rendering its decision and judgment, dismissing, quashing, and setting aside the indictment in this case upon a construction of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (it being the statute upon which said indictment was founded) such that the court held as a matter of law that such statute was applicable to the facts stated in the indictment only as it denounces the making of contracts in restraint of trade and commerce among the several States and with foreign nations, such offenses not being continuing offenses in their nature, and not as it denounces the continuing offenses of engaging in conspiracies in restraint of such trade and commerce, and the monopolizing of, and attempting to

monopolize, and conspiring of persons and corporations together to monopolize the same, in said statute mentioned and in terms charged in said indictment.

41.

In looking at the whole record, upon the filing of the special demurrer of the United States to the first separate special plea in bar of the Defendant Kissel, in order to ascertain which party was first in fault, the court erred in dismissing the indictment upon a construction of the statute upon which the indictment was founded to the effect that the word conspiracy as used in that statute has substantially the same meaning as the word contract.

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42.

In looking at the whole record, upon the filing of the special demurrer of the United States to the special plea in bar of the Defendant Harned, in order to ascertain which party was first in fault, the court erred in dismissing the indictment upon a construction of the statute upon which the indictment was founded to the effect that the word conspiracy as used in that statute has substantially the same meaning as the word contract.

43.

The court erred in rendering its decision dismissing, quashing, and setting aside the indictment in this case as to the Defendant Kissel upon the ground that the facts charged therein did not constitute any offense against the United States within the meaning of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," that being the statute upon which said indictment was founded, except the offense of making, more than three years before the indictment was found, a contract in restraint of trade and commerce among the several States and with foreign nations.

44.

The court erred in rendering its decision dismissing, quashing, and setting aside the indictment in this case as to the Defendant Harned, upon the ground that the facts charged therein did not constitute any offense against the United States within the meaning of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," that being the statute upon which said indictment was founded, except the offense of making, more than three years before the indictment was found, a contract in restraint of trade and commerce among the several States and with foreign nations.

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45.

The court erred in dismissing the indictment in this case immediately upon the overruling of the special demurrer of the United States to the first separate special plea in bar filed by the Defendant Kissel without giving the United States an opportunity to traverse said plea, it being a plea seeking to bar prosecution of that defendant under said indictment by reason of the fact alleged in said plea that said indictment was not found within three years next after the offense therein charged was committed, and by reason of the provisions of section 1044 of the Revised Statutes of the United States, and said special demurrer being based upon the fact that such plea amounts to a plea of the general issue when interposed to an indictment, such as the one in this case, charging an offense continuing in its nature and charging defendants with continuously committing such offense throughout the period of six years next preceding the finding and presentation of the indictment.

46.

The court erred in dismissing the indictment in this case immediately upon overruling the special demurrer of the United States to the special plea in bar filed by the Defendant Harned and without giving the United States an opportunity to traverse said plea, it being a plea seeking to bar prosecution of that defendant under said indictment by reason of the fact alleged in said plea that said indictment was not found within three years next after the offense therein charged was committed, and by reason of the provisions of section

150 1044 of the Revised Statutes of the United States, and said special demurrer being based upon the fact that such plea amounts to a plea of the general issue when interposed to an indictment, such as the one in this case, charging an offense continuing in its nature and charging the defendants with continuously committing such offense throughout the period of six years next preceding the finding and presentation of the indictment.

47.

The court erred in not deciding that the first separate special plea in bar of the Defendant Gustav E. Kissel, filed July 29, 1909, attempting to set up the statute of limitations, was insufficient in law to show that the statute of limitations had run.

48.

The court erred in not deciding that the special plea in bar of the Defendant Thomas B. Harned, filed August 3rd, 1909, attempting to set up the statute of limitations, was insufficient in law to show that the statute of limitations had run.

49.

The court erred in not deciding that the first separate special plea in bar of the Defendant Gustav E. Kissel, filed July 29, 1909, attempting to set up the statute of limitations was bad, because it traversed specific allegations contained in the indictment not properly traversable in said plea.

151 50.

The court erred in not deciding that the special plea in bar of the defendant Thomas B. Harned filed August 3rd, 1909, attempting to set up the statute of limitations was bad, because it traversed specific allegations contained in the indictment not properly traversable in said plea.

And the United States aforesaid, plaintiff in error, prays that the order entered herein overruling the said demurrers interposed by the United States to said special pleas and sustaining the said pleas as sufficient in law and denying the motion of the United States to have said plea treated as a plea of not guilty and directing the entry of judgment overruling the said several demurrers and each of them, sustaining the said pleas, denying said motion and dismissing the said indictment as to the defendants Kissel and Harned and the judgment entered thereon and in accordance therewith for the errors aforesaid and other errors in the record and proceedings herein may be reversed and altogether held for nothing, and that the plaintiff in error may be restored to all things which it has lost by reason of said order and judgment and that the Circuit Court of the United States for the Southern District of New York be directed to vacate and set aside said order and to overrule said special pleas and to enter judgment accordingly.

Dated New York, December 8, 1909.

HENRY A. WISE,
United States Attorney in and for
the Southern District of New York,
Attorney for Plaintiff in Error.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Dec. 8, 1909. John A. Shields, clerk.

152 *By the Honorable . one of the judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, to Gustav E. Kissel and Thomas B. Harned, greeting:*

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden at the city of Washington, in the District of Columbia, on the fifth day of January, 1910, pursuant to an order and writ of error filed in the clerk's office of the

Circuit Court of the United States for the Southern District of New York, wherein the United States of America is plaintiff in error and you are defendants in error, and you are to show cause, if any there be, why the order and judgment in said order and writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district and circuit above named, this eighth day of December, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-fourth.

GEO. C. HOLT,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

153 Indorsement: United States Circuit Court, Southern District of New York. United States of America, plaintiff in error, against Gustav E. Kissel and Thomas B. Harned, defendants in error. Citation. U. S. Circuit Court, Southern District N. Y. Filed Dec. 8, 1909. John A. Shields, clerk. Service of a copy of the within citation is hereby admitted. Dated New York, Dec. 8, 1909. William C. Osborn, atty. for Deft. Kessel. Hunt, Hill & Betts, attys. for Deft. Harned.

(Indorsement on cover:) File No. 21940. S. New York, C. C. U. S. Term No. 714. The United States, plaintiff in error, vs. Gustav E. Kissel and Thomas B. Harned. Filed December 23d, 1909. File No. 21940.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
GUSTAV E. KISSEL AND THOMAS B. HARNED. } No. 714.

MOTION TO ADVANCE.

On July 1, 1909, the American Sugar Refining Company and its directors, together with certain other persons, including the defendants in error here, were indicted in the Circuit Court of the United States for the Southern District of New York for conspiring to restrain interstate commerce in violation of the Sherman antitrust act of July 2, 1890. The indictment alleged, in substance, that the defendants conspired to prevent the Pennsylvania Sugar Refining Company from doing business; that this result was accomplished; that the defendant Kissel, acting secretly as agent of the American Sugar Refining Company, made a contract to loan to one Adolph Segal $1,250,000 upon a note of Segal's, secured by certain collateral, among which was a majority of the stock of the Pennsylvania Sugar Refining Company; that, having thus obtained a majority of the stock, a new board of directors in the interest of the American Sugar Refining Company

In the Supreme Court of the United States.

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was elected; that said board immediately voted to close the refinery of the Pennsylvania Sugar Refining Company; that this was done, and that company has since done no business.

The defendants pleaded in bar of the prosecution the statute of limitations; that the execution of the contract between Kissel and Segal and the other acts leading up to and including the closing of the Pennsylvania Sugar Refining Company's refinery were all done and the entire transaction closed in all respects on or before January 4, 1904. The Government, on the other hand, contended that the keeping of the refinery closed, in accordance with the conspiracy, constitutes a continuing offense.

To these pleas in bar the Government filed demurrers, which demurrers were overruled, the pleas in bar sustained, and the indictment dismissed. From this judgment the Government sued out a writ of error under the act of March 2, 1907 (34 Stat., 1246); and, in accordance with the requirement of that act, that cases under it "shall be diligently prosecuted and shall have precedence over all other cases," the Solicitor-General moves the court to advance the case on the docket and set it down for hearing on an early day during the next term of the court.

Notice of this motion has been served upon opposing counsel.

LLOYD W. BOWERS,
Solicitor-General.

APRIL, 1910.

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In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN error,
v.
GUSTAV E. KISSEL AND THOMAS B. Harned.
} No. 390.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here on writ of error issued under the Criminal Appeals Act to the Circuit Court of the United States for the Southern District of New York for review of a judgment of that court sustaining pleas of the statute of limitations interposed separately by Kissel and Harned to an indictment charging them, beside the American Sugar Refining Company (hereafter called the American Company) and six other persons, directors of the American Company, with (1) conspiring to restrain interstate

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and foreign commerce, (2) monopolizing such commerce, (3) attempting to monopolize such commerce, and (4) conspiring to monopolize such commerce. The indictment was filed July 1, 1909 (Rec. 31). The United States demurred to defendants' pleas of the statute of limitations (Rec., 54, 55); and the demurrer was overruled (Rec., 62, 63, 65, 66). The United States not asking leave to file replication to the plea, the judgment sustaining the plea also dismissed the indictment (Rec., 63, 66).

Defendant Kissel, beside his plea of the statute of limitations, filed a plea of immunity from prosecution, on the general ground that upon the trial of a civil case for damages brought by the Pennsylvania Sugar Refining Company (hereafter called the Pennsylvania Company) against the American Company, himself and others for a part of the same acts as are the subject of the present indictment, he (Kissel), on or shortly after May 26, 1909, produced in court, in obedience to a subpœna, certain documents relating to the matters charged in the indictment. (Rec., 35–51.) This plea of immunity, however, is not now before this court, for reasons stated in the argument. Defendant Harned filed only his plea of the statute of limitations. (Rec., 52.)

In the stated civil action of the Pennsylvania Company against the American Company, Kissel and others, a judgment of dismissal upon the ground that the complaint failed to state a cause of action was reversed by the Court of Appeals for the Second Circuit; and that court's opinion and decision are

reported in *Pennsylvania Sugar Refining Company* v. *American Sugar Refining Company* (166 Fed., 254).

Of the 14 counts of the indictment, counts 1, 5, and 9 charge conspiracy in restraint of commerce; counts 2, 6, and 10 charge monopolizing; counts 3, 7, and 11 charge attempts to monopolize; and counts 4, 8, and 12 charge conspiracy to monopolize. The differences between the three counts in each of these four groups are that the first of the three counts in each group relates to interstate commerce in refined sugar; the second relates to interstate commerce in raw sugar and molasses; and the third relates to foreign commerce in raw sugar and molasses. Count 13 is a combined charge of conspiracy in restraint of interstate and foreign commerce in raw sugar and molasses and in restraint of interstate commerce in refined sugar. Count 14 is a combined charge of monopolizing, attempting to monopolize, and conspiring to monopolize interstate and foreign commerce in raw sugar and molasses and interstate commerce in refined sugar. (Rec., 3–31.)

As, however, all 14 counts of the indictment relate to the same detailed facts, a single outline of them will suffice; and the argument also may be confined to the first count, because its discussion may be applied readily to the other counts, and reference at all times to all four of the different sorts of alleged offenses, viz, conspiracy in restraint of commerce, monopolizing, attempting to monopolize and conspiring to monopolize, would introduce intolerable confusion.

The skeleton facts charged in the indictment (Rec., 3–18), in aid of all the counts, are:

The American Company during the whole period involved in the controversy has been a corporation of New Jersey engaged in the business of buying and selling raw sugar and molasses in interstate and foreign commerce, manufacturing refined sugar, and selling that sugar in interstate commerce. It has had and controlled 90 per cent of such business. (Rec., 3, 4.) The Pennsylvania Company was organized as a corporation of Pennsylvania for the purpose of doing business of like character with that of the American Company; it continued in existence up to the time of the indictment, and on December 30, 1903, it was ready for business, having completed a large sugar manufacturing plant at Philadelphia and otherwise equipped itself for business at an outlay of at least $2,000,000. (Rec., 4.) From that time on the Pennsylvania Company would have carried on its business in competition with the American Company "if it had not been for the unlawful and corrupt conduct of said corporation defendant [i. e., the American Company], of its said directors," and of the other defendants in this indictment, as detailed in the indictment. (Rec., 4.) The conspiracy charged to have been begun on December 30, 1903, and repeatedly alleged to have existed continuously up to the indictment (Rec., 5, 6, 18), had the object of putting and *keeping* the Pennsylvania Company out of business and competition with the

American Company for an indefinite period—as long as possible. (Rec., 5, 6, 18.)

The initial or principal steps in the conspiracy (and they were promptly taken) were to be—as can hardly be abbreviated with necessary accuracy from the following vital parts of the indictment:

First. One Adolph Segal, of said city of Philadelphia, being on said thirtieth day of December, in the year nineteen hundred and three, the treasurer of the Champion Construction Company, a corporation, and the owner and holder of a majority of its capital stock, and said Champion Construction Company being the owner and holder of a majority, to wit, twenty-six thousand out of a total of fifty thousand of the shares of the capital stock of said Pennsylvania Sugar Refining Company, and said Adolph Segal therefore being the virtual owner and holder of a controlling interest in the stock of said Pennsylvania Sugar Refining Company; and said corporation and individual defendants then having knowledge of said facts pertaining to said Adolph Segal's said stock ownership in and control of said Champion Construction Company and Pennsylvania Sugar Refining Company, said corporation and individual defendants were to get from said Champion Construction Company, through said Adolph Segal, for said corporation defendant, the possession, use, and control of and the authority to vote said shares of capital stock in, and thereby secure the power of control over and management of said Pennsylvania Sugar Refining Company

for the term of one year at least, to be accomplished by inducing said Adolph Segal to borrow, for the term of one year from the fourth day of the then next succeeding month of January, from said Gustav E. Kissel, acting as a broker and as the agent for a lender whose identity was not to be by him or any of said defendants disclosed to said Adolph Segal, but which lender was in fact to be said corporation defendant, a large sum of money, to wit, of the sum of twelve hundred and fifty thousand dollars, at six per cent interest, for use in his business as a promoter of hotel and manufacturing enterprises, and to transfer to said Gustav E. Kissel, together with other security for the repayment of said sum of money, written authority to exercise the power of voting as a holder of said twenty-six thousand shares of stock of said Pennsylvania Sugar Refining Company without said Adolph Segal being aware of the fact that said corporation defendant would be the real lender of such sum of money to him and without his suspecting the designs of said corporation and individual defendants in the premises, or having reason to suppose that such undisclosed lender would have any other desire but one to obtain the interest upon and the repayment of such sum when due, or any motive for preventing said Pennsylvania Sugar Refining Company from carrying on its said intended business, trade, and commerce, and thereby earning profits and paying dividends to its stockholders in such a way as to enable said Adolph Segal to pay such interest and

repay such principal sum so to be borrowed; it being a fact, as the grand jurors aforesaid, upon their oath aforesaid, charge it to be, that, as said corporation and individual defendants then well knew, said Adolph Segal would be dependent upon such dividends for moneys with which to pay such interest and repay such borrowed sum and, in the event of said Pennsylvania Sugar Refining Company's failure to carry on its said business, trade, and commerce and pay such dividends, his financial affairs would be put in a ruinous condition, and the hold of said corporation defendant upon him and upon said Pennsylvania Sugar Refining Company, by reason of such his obligations to said corporation defendant, continued and greatly strengthened.

Second. When the power of control over and management of said Pennsylvania Sugar Refining Company should be so acquired by said corporation defendant for the term of one year in the manner aforesaid, said corporation and individual defendants were to use every means in their power to extend said term and said power of control, particularly by keeping said Adolph Segal involved in debt and his affairs in such a condition as to prevent his relieving himself from his obligations to said corporation defendant, and by wrongfully and arbitrarily refusing to accept payment of such obligations from him either before or at their maturity, or to surrender to him such power of control over and management of said Pennsylvania Sugar Refining Company.

Third. When the power of control over and management of said Pennsylvania Sugar Refining Company should be so acquired by said corporation and individual defendants in the manner aforesaid, said corporation and individual defendants were to make use of the same to prevent said Pennsylvania Sugar Refining Company from engaging in or carrying on, in whole or in part, the business, trade, and commerce which it was so organized for carrying on, and had so prepared to carry on, and so intended to carry on, as aforesaid; and were thereby to bring about the ruin of said Pennsylvania Sugar Refining Company through inaction, and the destruction of its said property and facilities through decay, and eliminate and entirely prevent the competition with said corporation defendant which would, but for the acts of said corporation and individual defendants in the premises, come into existence through the operation of said Pennsylvania Sugar Refining Company. (Rec., 5, 6.)

Execution of the conspiracy began speedily and vigorously. On December 30, 1903, the agreement between Segal and Kissel, a broker, and acting as agent for an undisclosed principal, the American Company, was executed; of which the salient points are that Segal was loaned $1,250,000 for which he gave Kissel as security 26,000 shares, a majority, of the stock of the Pennsylvania Company "with the right to the stock and all voting and other rights which belong to it;" the collateral for the loan also

embraced $500,000 of the bonds of the Pennsylvania Company, secured by a mortgage of the company's property; Segal agreed that he would "so arrange that the absolute voting power for the said 26,000 shares of the stock of the Pennsylvania Sugar Refining Company shall be in the lenders; that the lenders shall have the right to use such voting power as may be suitable to aid or effectuate the purposes hereof; and *as the control thereby given is a material part of the consideration* for the said note the borrower further agrees that he will so arrange that of the seven directors of the said Pennsylvania Sugar Refining Company, four to be nominated by the lenders, of whom one shall be the said Gustav E. Kissel, shall be put in place of four of the present directors; that they, or substitutes to be nominated by the lenders, shall be directors so long as any part of the loan shall remain unpaid (Rec., 9); Segal further agreed "that the control and possession of the property of the said the Pennsylvania Sugar Refining Company shall be in such way and *so effectually subjected to the control of the board of directors* that so long as the note, or any part thereof, remains unpaid the refinery of the said the Pennsylvania Sugar Refining Company *shall only be run or operated or do business as shall be directed* by such board of directors" (Rec., 9).

The Champion Construction Company, of which defendant Harned was president and Segal was treasurer, and of which Segal owned a controlling

Third. When the power of control over and management of said Pennsylvania Sugar Refining Company should be so acquired by said corporation and individual defendants in the manner aforesaid, said corporation and individual defendants were to make use of the same to prevent said Pennsylvania Sugar Refining Company from engaging in or carrying on, in whole or in part, the business, trade, and commerce which it was so organized for carrying on, and had so prepared to carry on, and so intended to carry on, as aforesaid; and were thereby to bring about the ruin of said Pennsylvania Sugar Refining Company through inaction, and the destruction of its said property and facilities through decay, and eliminate and entirely prevent the competition with said corporation defendant which would, but for the acts of said corporation and individual defendants in the premises, come into existence through the operation of said Pennsylvania Sugar Refining Company. (Rec., 5, 6.)

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The Champion Construction Company, of which defendant Harned was president and Segal was treasurer, and of which Segal owned a controlling

amount of stock (Rec., 5), thereupon promptly executed a written consent "that the 26,000 shares of the capital stock of the Pennsylvania Sugar Refining Company, mentioned in" the agreement of Kissel and Segal, "shall be used as therein provided." (Rec., 9, 10.) Still on the same day, December 30, 1903, the Champion Construction Company, by its president, defendant Harned, executed a power of attorney to Kissel and any persons whom he might substitute as the grantee of the power to vote the 26,000 shares of stock of the Pennsylvania Company in electing directors of the Pennsylvania Company or in any other action; and this proxy was made irrevocable so long as Segal's debt remained unpaid. (Rec., 10.) At once directors in the interest of the American Company, including Kissel, were substituted for old directors on the board of the Pennsylvania Company, and still on December 30, 1903, the new board of directors of the Pennsylvania Company, with the help of Kissel's vote, ordered that the Pennsylvania Company "*should thereafter refrain from carrying on its business until the further order of said board of directors.*" (Rec., 10, 11.) As a natural result, and indeed after more delay than might have been expected, the Pennsylvania Company (as Kissel's own plea informs us) went into a receiver's hands on October 2, 1906 (Rec., 33), from which that company had not emerged in July, 1909. (Rec., 33.)

Many overt acts, beside the foregoing—seventeen in all (Rec., 7–18)—are alleged in the indictment,

including five such acts done within three years of the filing of the indictment by other defendants than Kissel and Harned, and three such acts done within those three years by Kissel himself. As, however, these eight acts, charged to have been done within three years of the filing of the indictment, are claimed by defendants to have been incapable of operating as "overt acts," because (as is said) they could not possibly tend to effect the object of the conspiracy, it is better not to detail them here but to refer to their exact description and the discussion of their character and tendency in pages 56–66 of the following argument.

The limitation pleas filed by Kissel and Harned are essentially alike. (Rec., 32–34; 52–54.) They both are of complex and peculiar form, departing widely from a simple statement that the offenses charged upon defendants were not committed within three years of the filing of the indictment. Their character is described and their effect is considered on pages 68–71 of the argument.

The opinion of Judge Holt, given below, is found on pages 56–61 of the record.

ASSIGNMENT OF ERRORS.

The Circuit Court erred—

(1) In overruling the demurrers of the United States to the pleas of the statute of limitations.

(2) In sustaining either Kissel's or Harned's plea of the statute of limitations.

(3) In dismissing the indictment as to Kissel.

(4) In dismissing the indictment as to Harned.

ARGUMENT.

Stating in the briefest form the points that are given with more fullness and accuracy at the commencement of their particular discussion, I shall argue:

First. The immunity plea of Kissel is not now before the court.

Second. A special plea of the statute of limitations is not allowable in Federal criminal procedure; or, if allowable at all, it must admit all the allegations of the indictment like a demurrer.

Third. Consequently, as well as because the Circuit Court so treated them, the limitation pleas must be taken as admitting what the indictment avers.

Fourth. The indictment is good on its face, both because no overt act is necessary within three years of prosecution if the conspiracy agreement or confederation continues to exist within those three years, and also because overt acts were done under this conspiracy within three years of the filing of the indictment both by the other defendants than Kissel and Harned and also by Kissel himself.

Fifth. The pleas, at any rate, can not raise an issue on any point but the time of the alleged offense; and, as defendants' pleas do make certain other issues, they are duplicitous and usurp the office of a plea of not guilty.

Sixth. In their true construction, however, the pleas admit continuance of the conspiracy within three years of the indictment; and therefore they

are bad, as no overt act within three years is necessary.

Seventh. Even if the judgment of the Circuit Court is not reversed, it should be modified by this court so as to allow the United States still to reply to the pleas, and so to have the question whether the conspiracy actually existed within three years tried on its merits by a jury.

Treating these points successively—

FIRST.

Kissel's plea of immunity from prosecution is not now before this court.

1. The judgment of the Circuit Court in terms relates to, and acts upon, the limitation pleas alone. The demurrers which were sustained are addressed only to the limitation pleas (Rec., 54, 55), and the pleas declared to be sustained are only the limitation pleas (Rec., 62, 63, 65, 66). Neither the order for judgment nor the judgment, as the references just given will show, considers or determines the immunity plea in any way.

While the indictment was dismissed by the judgment of the Circuit Court, that result necessarily followed from holding the limitation pleas good. It was not necessary to pass upon the immunity plea. The Criminal Appeals Act, in allowing the Government to appeal "from the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy" (34 Stat., 1246), does not bring into this court any other question than the propriety of the special plea which is actually upheld.

2. The record does not disclose what action the United States took concerning Kissel's immunity plea. Neither demurrer, replication, nor motion of any kind concerning that plea is shown. Nor does it appear whether the United States has yet been ordered to plead to the immunity plea. *Non constat*, therefore, whether the United States demurred to the immunity plea or made replication to it, or whether the United States has had to plead at all to that plea, or whether it is yet in default for not so pleading. If the United States did demur to that plea, that demurrer has not yet been disposed of in the Circuit Court, but still stands.

3. Defendant Harned filed no immunity plea.

SECOND.

It is doubtful whether a special plea of the statute of limitations is allowable at all in Federal criminal procedure; but, if it be, such plea must be in confession and avoidance of all the allegations of the indictment charging the offense. In other words, a special plea of the statute of limitations may properly be used in Federal criminal procedure only as a demurrer or to traverse an allegation of the indictment made in anticipation of a defense of the statute of limitations, such as an allegation that defendant has been a fugitive from justice. The plea never can traverse any allegation of the indictment charging the offense.

A. The plea ought not to be allowed in any case, and defendant should be left to assert the defense under the plea of not guilty, as he may.

1. It is beyond dispute that the plea of not guilty embraces a defense of the statute of limitations in a criminal proceeding.

Rex v. *Sidney*, 9 State Trials (Howell) 817, 820, 821.

Streep v. *United States*, 160 U. S., 128.

United States v. *Brown*, 2 Lowell, 267.

Hatwood v. *State*, 18 Ind., 492.

Wharton's Criminal Pleading and Practice. (9th ed., 1889, sec. 317.)

1 Bishop's Criminal Procedure, sec. 799.

In *Streep* v. *United States, supra*, the statute of limitations was raised at the trial under the plea of not guilty, in the following manner:

> I ask your honor to direct the jury to acquit on the ground that it appears from the indictment and the files, the records of this court, and from the testimony, that the offense, if any, was committed more than three years prior to the time of filing the indictment. (Record of case, p. 29.)

The availability of the general issue will likewise appear from the entire absence of any special plea of the statute of limitations in English criminal procedure.

2. A special plea of the statute of limitations has never been known in English criminal procedure.

Chitty's Criminal Law (5th Am. Ed., 1847), pp. 445–480.

Archbold's Criminal Procedure (8th Ed., Pomeroy, 1880), pp. 336–354.

Stephen's Digest of the Law of Criminal Procedure, Article 263, p. 173.

2 Russell on Crimes (7th Eng. Ed., 1910), p. 1981 et seq.

Stephen says: "There are four pleas in bar, namely, not guilty, autrefoits acquit, autrefoits convict, and pardon." (Art. 263.)

Federal criminal procedure is that of England, except as altered by congressional enactment; and state statutes have no pertinence. The impropriety of a special plea of the statute of limitations in England ought to determine the matter for the Federal courts, unless it be found that this court has sanctioned the plea. There is no Federal statute concerning the question.

3. Modern legislation in the States excludes the plea. Thus, section 4359 of the Iowa Code of 1873 declares:

> There are but three pleas to an indictment. A plea of:
>
> 1. Guilty.
> 2. Not guilty.
> 3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded with or without the plea of not guilty.

This section has been held to forbid a special plea of the statute of limitations. (*State* v. *Whalen*, 98 Iowa, 662, 668–669.) The Iowa code of to-day retains the same provision. (Annotated Code of Iowa, 1897, sec. 5333, p. 2035.)

The Criminal Code of New York likewise limits pleas in bar to guilty, not guilty, and former conviction or acquittal. (N. Y. Code of Criminal Procedure, 1881, sec. 332; id., as edited by Parker and repub-

lished by Banks Co., 1905.) The legislation of Canada is the same; the criminal code providing—

> The following special pleas and no others may be pleaded according to the provisions hereinafter contained, that is to say, a plea of *autrefois acquit*, a plea of *autrefois convict*, a plea of pardon, and such pleas in cases of defamatory libel as are hereinafter mentioned.
>
> 2. All other grounds of defense may be relied on under the plea of not guilty. (Revised Statutes of Canada, 1906, vol. 3, ch. 146, sec. 905, p. 247.)

These illustrative pieces of legislation, beside conforming to the historical rule in England, show that it rests upon good policy. Indeed, in the States generally pleas in bar to indictments are now seldom used, the general issue taking their place. Chief Justice Bigelow said, as long ago as 1866:

> Here, however, as in England, special pleas in bar to indictments are now seldom used, except in a few cases, the usual practice being to plead the general issue and give any special ground of excuse, justification or exemption, in evidence under the general issue. (*Nauer* v. *Thomas*, 95 Mass., 572, 579.)

4. Federal authority leaves the question quite open, unless the cases of *United States* v. *Norton* (91 U. S., 566) and *United States* v. *Hirsch* (100 U. S., 33), give the plea a general sanction.

Each of these cases came to this court on a certificate of difference in opinion among the circuit judges,

and the question decided in the cases was therefore presented by the inquiry of the circuit judges. In neither case was the propriety or scope of the plea of the statute of limitations discussed or considered in this court.

The only other cases in this court needing mention are *United States* v. *Hewecker* (164 U. S., 46) and *United States* v. *Irvine* (98 U. S., 450).

The *Hewecker* case was dismissed for want of jurisdiction, and therefore held nothing but the jurisdictional point. In the *Irvine* case (likewise coming to this court on certificate of difference of opinion below) the question of the statute of limitations was in fact presented under a plea of not guilty, an attempt at a special plea of the statute having been abandoned by defendant below. The record of the *Irvine* case discloses the proceedings as follows:

Defendant first put in this anomalous plea, "that said indictment aforesaid was not found within two years next before said offense is therein alleged and charged to have been committed." (Rec., *United States* v. *Irvine*, p. 11.) This plea, of course, was pure nonsense, because it complained that the indictment was not found before the offense. Thereafter defendant pleaded not guilty, and issue was joined on that plea alone. (Rec., pp. 4 and 5.) This court, in saying in its opinion that "the defendant pleaded the statute of limitations of two years as a bar," etc. (p. 451), undoubtedly referred to the fact that, as the record of the case discloses, "defendant asked

the court to instruct the jury to acquit him because the offense was barred by the statute of limitations; which the court refused to do." (Rec., pp. 4, 5, 13; quotation from certificate, p. 13.) It is thus apparent that in the *Irvine* case the defense of the statute of limitations was presented under the plea of not guilty, rather than by a special plea.

There is nothing more in this court; except that, as already seen, the statute of limitations was likewise raised under the general issue in the *Streep* case (160 U. S., 128). The case of *Adams* v. *Woods* (2 Cranch, 336), is entirely distinguished by the fact that it was a civil action, and so was subject to the rules governing civil cases. (*Hepner* v. *United States*, 213 U. S., 103.)

Turning to the lower Federal courts, the distinction just stated concerning *Adams* v. *Woods* disposes of—

United States v. *Perkins*, 4 Cliff., 321.
McGlinchy v. *United States*, 4 Cliff., 312.
Stimpson v. *Pond*, 2 Curtis, 502.
United States v. *Platt*, 27 Fed. Cas. No. 16054a; p. 546.
United States v. *Mayo*, 1 Gall., 396.
United States v. *Maillard*, 4 Ben., 459.

All the foregoing were civil actions.

Of the other Federal cases cited for defendant below, *United States* v. *Wells* (163 Fed., 313), arose on demurrer. In *United States* v. *Shorey* (27 Fed. Cas. No. 16280, p. 1070), defendant pleaded both not guilty and the statute of limitations. The latter plea was accordingly stricken out. The case is an author-

ity against double pleading in criminal prosecutions. We have left, of defendants' citations below, simply *United States* v. *Slacum* (1 Cranch, C. C., 485); *United States* v. *Wright* (28 Fed. Cas. No. 16770, p. 789); *United States* v. *Comstock* (162 Fed., 416), and *United States* v. *Brace* (149 Fed., 874). These four cases seem to be all that exist in the lower Federal reports where a special plea of the statute of limitations was entertained, whether on the merits it was upheld or overruled; and in these four cases, as in the *Norton* and *Hirsch* cases in this court, the propriety of such a plea was not questioned or considered.

The foregoing history of the use in a criminal case of the special plea of the statute of limitations in the Federal courts seems to leave open the question whether that plea may properly be used; and, if it be open, the question ought to be answered according to the continuous English precedent and the example and policy of modern American legislation. Defendant under an indictment does not need the special plea, for he can have like benefit of the statute of limitations under the general issue.

B. *If the special plea be allowable at all, its use certainly must be restricted so as to act as a demurrer to the indictment or as a traverse of nothing more than such allegation as may be in the indictment in mere anticipation of a defense of the statute of limitations; such as an allegation that defendant has been a fugitive from justice.* In other words, the plea must not traverse any material allegation of the indictment relating to the merits—i. e., averring any fact concerning the

commission of the crime. Unless the plea is so restricted, it usurps the office of the plea of not guilty, and its use will lead to various and serious confusion, delay, and difficulty. On the other hand, use of the special plea under the indicated restriction will accomplish every proper purpose that can be claimed for it.

1. There is not a Federal case in any court, so far as I have been able to find, which gives to the special plea a wider scope than I claim that it should have.

In *United States* v. *Norton* (91 U. S., 566) the question was whether a two-year or a five-year period of limitation was applicable. If the former, the indictment itself showed the prosecution to be too late; and so it was held. The decision therefore was necessary, though the plea admitted the allegations of the indictment.

In *United States* v. *Irvine* (98 U. S., 450), while the question arose under the general issue (as already shown), the decision was that the statute began to run when money was first withheld by a pension agent, and that the continuous withholding was not a continuing offense; and, as the indictment itself showed that the money was first withheld nearly five years before the indictment was found, the prosecution was too late on the allegations of the indictment itself.

In *United States* v. *Hirsch* (100 U. S., 33), the first and second counts of the indictment charged conspiracies, entered into, respectively, on September 1, 1873, and September 13, 1873, and not continuing beyond September 14, 1873. (Rec., *United States* v.

Hirsch, pp. 1–4.) The other two counts of the indictment alleged entries of goods at a custom-house by means of fraudulent invoices and false classification in or later than September, 1873. The indictment was found February 3, 1877. The question was whether the ordinary three-year statute or the special five-year statute concerning crimes under the revenue laws was applicable. This court held the three-year statute applicable to the first two counts and the five-year statute applicable to the other counts. On the face of the indictment therefore the first two counts were barred and the other two counts were not barred. It was so determined. The special plea of the statute of limitations was therefore given the very effect which the allegations of the indictment itself necessitated.

In none of the cases in this court, therefore, has the plea been used as a traverse of any allegation of an indictment concerning the fact or time of commission of the offense charged. Such judgment has always been given upon the plea as was consistent with the indictment. The same is true of the inferior courts' decisions. We have here only to consider those four cases in which, as previously shown, a special plea of the statute of limitations has been acted upon in a criminal case in the lower courts, viz:

United States v. *Slacum*, 1 Cranch, C. C., 485.

United States v. *Wright*, 28 Fed. Cas., No. 16770.

United States v. *Comstock*, 162 Fed., 416.

United States v. *Brace*, 149 Fed., 874.

In *United States* v. *Slacum* the report does not show what the allegations of the indictment were; so that it does not appear whether the plea was inconsistent with the indictment or not. The case therefore has no pertinence. In *United States* v. *Wright* defendant pleaded a two-year statute, and the plea was held bad because a five-year period was applicable. No question of inconsistency between the plea and the averments of the indictment could have been involved; because the plea itself admitted the offense to have been committed within five years. *United States* v. *Comstock* is of identical character with the *Wright* case. The plea claimed that the offense was not committed within one year of the indictment; it therefore admitted that it was committed within three years; and the court held the three-year statute applicable and the plea therefore bad. In *United States* v. *Brace* we have a positive authority for treating the special plea as a demurrer. The indictment charged that the defendants entered into a conspiracy on May 25, 1902, that certain overt acts were done between June 10, 1902, and September 15, 1902, and that the conspiracy was continuously in execution until the last-named date.

The indictment was found September 8, 1905. Defendant interposed a special plea that more than three years, viz, three years and eighty-nine days, had elapsed between the commission of the crime and the finding of the indictment. The United States demurred, and the plea was overruled on the ground, among others, that the indictment showed an overt act to have been done and the conspiracy to have

continued within three years of the finding of the indictment. Had the plea been treated as a traverse of the indictment, it would have had to be sustained; for the applicable statute of limitations fixed a three-year period of limitation and the plea averred that the offense was not committed within three years. The court therefore reached its judgment by treating the plea like a demurrer.

The summary result of the foregoing is that a Federal court has never yet allowed a special plea of the statute of limitations as a traverse of the allegations of the indictment concerning the fact or time of committing the offense. The plea has always led to a judgment consistent with the allegations of the indictment.

2. Use of the special plea as a traverse of any allegations concerning the fact or time of committing the offense charged would lead to confusion, difficulty, and delay.

If the special plea is permitted to operate as a traverse of anything concerning the merits, a jury trial on that traverse will be necessary; and such jury trial will necessarily be separate from and precede a later trial on the general merits if a plea of not guilty is later interposed. This results because the special plea can not be offered concurrently with a plea of not guilty, but must precede it. Double pleading is not permitted in criminal procedure; and such a special plea as the statute of limitation must be put in before the general issue.

1 Chitty's Criminal Law (5th Am. Ed., by Perkins), Star, pp. 434, 435.

Wharton's Criminal Pleading and Practice (9th Ed.), sec. 419.

United States v. *Shorey*, 27 Fed. Cas., No. 16, 280, p. 1070.

State v. *Ward*, 49 Conn., 429.

If any traverse of any part of the merits by a special plea is found by the jury for defendant, no question will arise concerning the effect of this verdict on a subsequent trial under a plea of not guilty, because the maintenance of the special plea will end the case; but, even with this outcome of the trial on the special plea, peculiar questions will arise on that trial. For instance, where is the burden of proof—on defendant to maintain his plea, or on the State to negative it? Also, will the rule that the State must show defendants' guilt beyond a reasonable doubt apply on the trial of the issue under defendants' special plea?

If, however, the jury find for the State on the issue made by a traverse of any part of the merits in a special plea by defendant, difficulties of another and more serious kind will arise which ought to be conclusive against allowing a special plea as a traverse. Will the verdict of the jury on the traverse estop defendant on the traversed point when later trial is had under a plea of not guilty? If it does work such an estoppel, defendant may be concluded though the burden of proof and the rule concerning the requisite amount of proof are different when the contest is

had under a special plea or under the general issue; and though defendant may well have been prejudiced on the trial of his traverse in the special plea by his admitting at that time all elements of the offense except the particular fact traversed, as would not be the case under the general issue. Further, if there be an estoppel against defendant upon the fact which the jury finds against him under his traverse by special plea there will often be much difficulty in ascertaining just the scope of that estoppel and the consequent range of its effect on the later trial under the general issue. *If, on the other hand, the jury's verdict on the special plea does not estop defendant upon any point on the later trial of the general issue, then the result of allowing defendant to traverse by special plea any part of the merits and later to interpose a plea of not guilty will be to allow to defendant two trials on the same question of fact concerning the commission of the offense.*

The force of these considerations is made clear by the fact that, even if the special plea of the statute of limitations is treated as traversing only the date on which the offense was committed, it is quite impossible to prove when an offense is committed without proving the actual occurrence of all the facts essential to constitute the offense. Concretely, if a defendant alleges that he did not steal or conspire between January 1, 1907, and January 1, 1910, how can that assertion of defendant be negatived without showing fully the actual occurrence of the theft or

the conspiracy? The trial of a question when an offense occurred must always involve full proof of the existence of the offense.

Another reason which seems to show that a verdict against defendant on a traverse of any part of the merits by special plea of the statute of limitations can not estop defendant at all on a later trial under a plea of not guilty is that a verdict never works an estoppel unless it is supplemented by judgment determining what the verdict embraces. (Bigelow on Estoppel, 5th ed., p. 51.) If, however, defendant is permitted to interpose a plea of not guilty after verdict against him on a traverse in a special plea, the judgment on the plea (if, instead of the court's allowing defendant to withdraw his special plea, there be a judgment on the plea at all) will not determine anything on the verdict, because it will expressly allow defendant by pleading not guilty to traverse and dispute everything which he might have disputed by interposing the plea of not guilty at the outset. It is submitted that this consideration should be decisive against allowance of a traverse by special plea of any allegation of the indictment concerning commission of the offense.

3. It is involved in the very nature of any special plea in bar that it admits everything that the indictment alleges in reference to commission of the offense. It does not dispute the indictment, but shows that defendant ought not to be required to respond to it at all.

Chitty says:

> We come now to the consideration of special pleas in bar, which, *without entering into the facts of the offense,* show that the defendant *ought not at all to be called upon to answer the indictment.* (1 Chitty's Criminal Law, 5th Am. Ed., 451.)

Bishop says, with specific reference to a plea of the statute of limitations:

> *As this plea does not deny the original guilt charged,* defendants are permitted to plead it; though they need not, for they may avail themselves of the defense under the general issue. (Bishop's Directions and Forms, 2d Ed., sec. 1046; note on p. 598.)

Further, it has been held several times that even in a civil case a plea of the statute of limitations in defense of plaintiff's cause of action, "if any such there be," is bad.

> 1 Chitty's Pleading (16th Am. Ed., 1876), star p. 551.
>
> *Margetts* v. *Bays,* 4 Ad. and El., 489.
>
> *Marchant* v. *Valley Falls Baptist Church,* 6 R. I., 24.
>
> *Conger* v. *Johnston,* 2 Den., 96.

Other cases, while holding the form of plea last described good, place their decision on the ground that such words—"if any such there be"—are not a traverse and the plea admits the merits.

> *Fish* v. *Farwell,* 160 Illinois, 236, 241.
>
> *Bartalott* v. *International Bank,* 14 Ill., App., 158, 162.

4. The Criminal Appeals Act itself seems to recognize—or at any rate it furnishes a cogent, if not decisive, reason for holding—that a plea of the statute of limitations (or any other special plea in bar) can not traverse the indictment. Is any special plea to be permitted to traverse anything concerning the merits, with the result that the Government may have an appeal after a verdict on that traverse in favor of defendant (because the statute allows an appeal by the Government from *any* judgment sustaining a special plea in bar), though the Government still can not appeal from a final judgment rendered after a trial under a plea of not guilty and based on a verdict in defendant's favor upon the very point of fact (showing the prosecution barred by time) which was embraced in the traverse in the supposed former case? Is use of a plea of the statute of limitations as a traverse to be allowed, with such different results as to the Government's right of appeal according as the traverse is made by special plea or by general issue? Indeed, would not that use of the plea perhaps create a situation in which the Criminal Appeals Act would be in part unconstitutional?

5. It is beyond dispute that a defendant will suffer no harm from being forbidden to traverse any part of the merits of the indictment by a special plea of the statute of limitations; for he may make the same traverse and assert the statute of limitations under a plea of not guilty. The only possible reason that can be urged for allowing a special plea of the statute of limitations at all is that a demurrer on the ground

of the statute will not lie, though the indictment itself shows the offense to have been committed too long before the indictment was found (*United States* v. *Cook*, 17 Wall., 168), and therefore it may be sometimes convenient to permit use of a special plea of the statute with the function of a demurrer, inasmuch as the objection to the use of a demurrer (which is that the State can not then show facts bringing defendant within exceptions to the statute of limitations, e. g., that defendant has been a fugitive from justice) can be met in case of a special plea by a replication alleging the exceptions. Why should a special plea be allowed a larger function than this single practical advantage to be derived from the plea requires? As already shown, any wider function for the plea will make trouble instead of doing good.

6. It remains to say only that the use of a special plea of the statute of limitations in civil cases furnishes no analogy for a criminal case; because in a civil case the plea's use is necessary to avoid a waiver of the statute (while that is not true in a criminal case), and also because in a civil case the plea may be interposed and tried simultaneously with the general issue, so that the difficulties above indicated through use of the plea as a traverse in a criminal case will not arise.

THIRD.

As a result of the first point, defendant's plea of the statute of limitations must either be held bad for usurping the office of the general issue, however

the plea be construed; or it must be held bad for amounting in effect to the general issue and also for duplicity, unless the plea is construed as consistent with all the allegations of the indictment.

In discussing whether the prosecution is barred by time, the plea will therefore be taken as admitting the indictment's averments; because otherwise the plea can not be considered at all. This course is also justified by the fact that the Circuit Court treated the plea as in effect a demurrer.

1. If a special plea of the statute of limitations is not allowable in any case, then this plea attempts what only a plea of not guilty can do. It therefore amounts in effect to the general issue.

2. If, on the other hand, a special plea of the statute of limitations may be employed, in case it does not traverse anything charged in the indictment concerning commission of the offense, then the plea in this case is bad for amounting in effect to the general issue, unless it be treated as consistent with the indictment. If the plea be taken as traversing any material allegation of the indictment, it likewise is bad for duplicity; because then it joins in a single plea the two defenses of the statute of limitations and a denial of the merits.

Union of both matter in confession and avoidance and a traverse in the same plea is duplicitous. (Stephen on Pleading, 9th Am. Ed., by Heard, 258.)

3. Beside the necessity of treating the plea as consistent with the indictment, in order to save it at all, it would be unjust for this court now to treat it as a traverse when the Circuit Court treated it as a de-

murrer. The action of the Government in not asking leave of the Circuit Court to plead over, after the Circuit Court held the plea good, was induced naturally and quite inevitably by the Circuit Court's treating the plea as admitting all parts of the indictment and then holding the indictment itself insufficient. Nothing could have been gained by pleading over in this situation. Indeed, if the Circuit Court was right in its treatment of the plea as practically a demurrer, it would have been improper to plead over.

FOURTH.

Upon its own allegations the indictment shows the offense charged against defendants to have been committed within three years before the indictment was found.

This proposition will be supported by these two separate contentions, of which either will suffice of itself to show that the prosecution is not barred:

I. The indictment charges a conspiracy which, though formed in 1903 and then at once followed by overt acts, *continued* as an existing agreement or confederacy up to the filing of the indictment on July 1, 1909. No additional overt act by anybody within three years before the finding of the indictment was necessary to make the still existing conspiracy agreement or combination an indictable offense.

II. If an overt act within three years before the finding of the indictment was necessary, many such acts are charged in the indictment.

In support of these propositions—

I.

The indictment charges a conspiracy which, though formed in 1903 and then at once followed by overt acts, *continued* as an existing agreement or confederacy up to the filing of the indictment on July 1, 1909. No additional overt act by anybody within three years before the finding of the indictment was necessary to make the still existing conspiracy agreement or combination an indictable offense.

1. It is unmistakable that the indictment in fact charges against all defendants the actual existence of a conspiracy agreement or confederation between defendants within three years before the indictment was found. It charges the existence of such an agreement or confederation continuously and at all times between its inception in 1903 and the finding of the indictment; and it also charges explicitly that the conspiracy had a continuing object, viz, not merely to put the Pennsylvania Company momentarily out of business and out of competition with the American Company, but to keep it out of business and competition permanently or at any rate as long as possible.

Thus, it is averred that "on said thirtieth day of December, in the year nineteen hundred and three and *continuously and at all times during said period of six years*, to wit, from that day until and on the day of the finding and presentation of this indictment," defendants "*have engaged in an unlawful and corrupt conspiracy* among themselves in restraint of

said trade and commerce in refined sugar among the several States of the United States; that is to say, a conspiracy unreasonably to restrain and eliminate free competition and prevent all competition" with the American Company. (Rec., 5.)

It is also directly alleged that defendants "*throughout the period of three years* next preceding the finding and presentation of this indictment, in manner and form aforesaid, unlawfully *have engaged in a conspiracy* in restraint of trade and commerce in refined sugar among the several States." (Rec., 18.) The averments just quoted directly state the existence of the conspiracy agreement or confederation as a fact.

The purpose entertained by the conspirators is averred to be that the Pennsylvania Company should be *kept* out of competition with the American Company permanently or as long as possible. Thus, it is stated that "when the power of control over and management of said Pennsylvania Sugar Refining Company should be so acquired by said corporation defendant for the term of one year in the manner aforesaid, said corporation and individual defendants were to use every means in their power *to extend said term and said power of control*, particularly by keeping said Adolph Segal involved in debt and his affairs in such a condition as to prevent his relieving himself from his obligations to said corporation defendant, and by wrongfully and arbitrarily refusing to accept payment of such obligations from him either before or at their maturity, or to surrender to him

such power of control over and management of said Pennsylvania Sugar Refining Company." (Rec. 6.) This is a charge that the conscious object of the conspiracy was to continue the subjection of the Pennsylvania Company to the American Company as long as possible. It is further alleged that defendants were to use their power of control over the Pennsylvania Company "to prevent said Pennsylvania Sugar Refining Company from engaging in or carrying on, in whole or in part, the business, trade, and commerce which it was organized for carrying on, and had so prepared to carry on, and so intended to carry on, as aforesaid; and *were thereby to bring about the ruin* of said Pennsylvania Sugar Refining Company through inaction, and the destruction of its said property and facilities through decay, and *eliminate and entirely prevent* the competition" with the American Company which otherwise would exist. (Rec. 6.) This means, of course, that defendants intended and mutually understood that they would keep the Pennsylvania Company out of business and competition as long as possible; and the words "eliminate and entirely prevent" its competition mean that it was proposed to keep the Pennsylvania Company out of competition permanently.

Indeed, any purpose on the part of the conspirators to keep the Pennsylvania Company out of business and competition merely for a moment, and not continuously, would be absurd. It would accomplish none of the objects which are charged to have been sought.

Likewise, the means charged to have been used by the conspirators manifest a continuous purpose of keeping the Pennsylvania Company inactive permanently or as long as possible. For illustration, the proxy given Kissel to vote a majority of the stock of the Pennsylvania Company was irrevocable. (Rec., 10.) The original agreement between Segal and Kissel provided that "as the control thereby given is a material part of the consideration for the said note, the borrower further agrees that he will so arrange that, of the seven directors of the said Pennsylvania Sugar Refining Company, four to be nominated by the lenders, of whom one shall be the said Gustav E. Kissel, shall be put in place of four of the present directors; that they, or substitutes to be nominated by the lenders, shall be directors so long as any part of the loan shall remain unpaid; that the control and possession of the property of the said the Pennsylvania Sugar Refining Company shall be in such way and so effectually subjected to the control of the board of directors that so long as the note, or any part thereof, remains unpaid, the refinery of the said the Pennsylvania Sugar Refining Company shall only be run or operated or do business as shall be directed by such board of directors." (Rec., 9.) The directors of the Pennsylvania Company, chosen in the interest of the American Company, left their order of December 30, 1903, that the Pennsylvania Company "should thereafter refrain from carrying on its business until the further order of said board of directors," continuously unrevoked

and effective. (Rec., 10, 11.) By this means they pursued their purpose of keeping the Pennsylvania Company from "earning profits and paying dividends to its stockholders in such a way as to enable said Adolph Segal to pay such interest and repay such principal sum so to be borrowed; it being a fact, as the grand jurors aforesaid, upon their oath aforesaid, charge it to be, that, as said corporation and individual defendants then well knew, said Adolph Segal would be dependent upon such dividends for moneys with which to pay such interest and repay such borrowed sum and, in the event of said Pennsylvania Sugar Refining Company's failure to carry on its said business, trade, and commerce and pay such dividends, his financial affairs would be put in a ruinous condition, and the hold of said corporation defendant upon him and upon said Pennsylvania Sugar Refining Company, by reason of such his obligations to said corporation defendant, continued and greatly strengthened." (Rec., 6.)

In view of the direct allegation of a continuously existing agreement or confederacy between the conspirators, and of the repeatedly alleged purpose of the conspiracy to keep the Pennsylvania Company out of business as long as possible, and of the character of the methods alleged to have been taken in pursuit of that purpose, it is impossible to dispute that the indictment charges as a fact the existence of the conspiracy agreement within three years before the indictment was found.

2. As the conspiracy agreement is charged to have actually existed up to the time of indictment and as any influence that section 5440 of the Revised Statutes may have upon the case is satisfied by the removal of any *locus pœnitentiæ* through the occurrence of overt acts at once after the conspiracy was formed, it is altogether immaterial whether or not any overt act was done by any conspirator within three years before the indictment was found. This is the most fundamental point on the merits of the case because it reaches to the bottom of the legal theory of conspiracy, and, while this indictment charges that overt acts for which defendants Kissel and Harned are responsible occurred within three years before the indictment was found, the court will not need to go to that branch of the case if the present point is sound.

I shall first treat the point with reference to conspiracies of various kinds under section 5440 of the Revised Statutes, as that will better introduce the pertinent general principles and the existing Federal cases commonly relate to that statute; and then the Sherman Act, on which this indictment is based, will be directly considered.

A. Concerning conspiracies generally.

(1) At common law the existence of the conspiracy agreement or confederation constituted the crime, without even a single overt act in pursuance of it.

Rex v. *Gill and Henry*, 2 B. & Ald., 204.

Bannon and Mulkey v. *United States*, 156 U. S., 464, 468, 469.

Wright's Criminal Conspiracies (Carson's Am. Ed., 1887), 124.

The gist of the offense is therefore the fact of confederating, as said by Chief Justice Savage in *People* v. *Fisher* (14 Wendell, 9). Section 5440 has not altered the nature of the offense or the rules relating to it, save in one particular, viz, that the conspiracy may not now be prosecuted until one overt act has been committed; because section 5440 gives a *locus pœnitentiae* until the commission of one overt act. After the commission of a single overt act, the law of conspiracy is unaffected by section 5440.

United States v. *Britton*, 108 U. S., 199.

Pettibone v. *United States*, 148 U. S., 197, 202.

Dealy v. *United States*, 152 U. S., 539, 543.

Bannon v. *United States*, 156 U. S., 464, 469.

Hyde v. *Shine*, 199 U. S., 62, 76.

Williamson v. *United States*, 207 U. S., 425, 447.

If, then, a conspiracy is indictable at common law before any overt act, it must have been likewise indictable at common law at any time after the commission of an overt act if the conspiracy agreement or confederation still actually existed. As section 5440 leaves the conspiracy agreement or confederation still the gist of the offense, it must be still an offense so long as that agreement or confederation in fact exists, whether or not it is supplemented by more than one overt act.

(2) The only question, therefore, concerning the operation of the statute of limitations is whether the conspiracy agreement or the confederation continued actually to exist within three years before the indictment. That question is answered by the actual averments of this indictment, as already shown; for *the question whether and how long the mutual understanding and purpose of the conspirators continues is one of fact.*

(3) A conspiracy agreement, at least if it be a conspiracy to accomplish an unlawful object, is in its very nature a continuing arrangement between the conspirators, the duration of the agreement or confederation depending upon the nature of the object which they propose to accomplish. Any conspirator, of course, by affirmative action may at any time withdraw from the conspiracy; but, in the absence of withdrawal, the conspirators contemplate continued action for a longer or shorter time, according to their ultimate object. So long as their understanding or agreement contemplates further action, if necessary to attainment of the ultimate object of the conspiracy, the agreement or confederation still exists, and the mere fact that during a certain time no action is found necessary or is taken does not terminate the existence of the mutual understanding and purpose if the object of the conspiracy has not yet been fully achieved.

Suppose the greatest of all conspiracies—to subvert the Government itself. The confederation for that purpose must be deemed to exist, in the absence of affirmative abandonment, until the object is at-

tained, or at any rate so long as the conspirators actually still contemplate action under it; and the conspiracy does not cease to exist from the mere fact that for a time the conspirators remain inactive. If abandonment of the conspiracy may be inferred sometimes from mere inaction, that can only be after the inaction has continued so long and under such circumstances that it may be inferred that the conspirators no longer contemplate any action in pursuit of their original purpose; and the extent of the time during which inaction must continue in order to evidence abandonment depends of course upon the terms of the conspiracy agreement and the object proposed to be accomplished. If conspirators expressly understand among themselves that they will pursue their object for six months, a year, or five years, no abandonment can be inferred from inaction for a shorter time than the understanding has expressly named for its own continuance. If, on the other hand, the conspiracy understanding does not definitely fix the time of its endurance, then the object of the conspiracy becomes all-important on the question how long the conspirators contemplated common action to a common end. As already shown, the object of the conspiracy in this case was, as the indictment alleges and as the very nature of the project discloses, not to suppress the competition of the Pennsylvania Company for a day or for a month or for a year, but to keep the Pennsylvania Company out of competition with the American Company as long as possible. The conspiracy having that continuing object,

the conspirators must be taken (in the absence of proof of affirmative withdrawal) to have contemplated continuous action as might be necessary from time to time for accomplishment of the continued suppression of the Pennsylvania Company's competition; and abandonment of their conspiracy agreement and purpose can not be inferred from mere inaction for even a substantial period.

Indeed, *abandonment* of a conspiracy, through inaction or otherwise, *is a question of fact;* just as is the original formation of the conspiracy. That fact is for the jury unless, in view of the alleged or proved nature and purpose of the conspiracy, inaction of the conspirators under it has endured so long that the court can say that a jury could not reasonably conclude that the inaction did not evidence abandonment. Any possibility of the court's deciding for itself that three years' inaction compels the legal conclusion that the conspiracy charged in this indictment had been abandoned is removed by the continuous purpose which the indictment charges the conspirators with entertaining in common. Beyond that, it is to be remembered again that this indictment charges continuance of the conspiracy agreement or confederation up to the time of indictment, and that negatives as a matter of fact any claim of abandonment until the allegations of the indictment are disproved by evidence.

(4) It is impossible to erect any rule that every conspiracy, without reference to its nature and object, must be deemed abandoned after three years of

inaction, through analogy of the statute of limitations. In the first place, the statute of limitations itself does not deal with the question how long any offense continues, but simply says that prosecution shall not be had more than three years after the offense has ceased to continue. The question when and how long any offense continues is quite independent of the statute of limitations. In the second place, an invariable rule for inferring abandonment of any conspiracy after three years of inaction disregards wholly the differences between conspiracies of different kind and purpose. If a conspiracy contemplating an immediate outcome may be deemed abandoned after three years of inaction, though its purpose was not attained, how can any such rule be applied to a conspiracy which contemplates a purpose to be attained long after inception of the conspiracy, or which contemplates a purpose of maintaining a situation, as in this case, indefinitely? Further, how can a conspiracy be deemed abandoned after three years of inaction if by its explicit terms the conspirators contemplate continuous action for a long period, or perhaps contemplate directly a long suspension of their activities in the course of their plan? An unvarying rule concerning the effect of inaction is utterly incompatible with the infinite variety of possible conspiracies, as to both their plan and their purpose. In the third place, and conclusively, if from a false analogy of the statute of limitations three years of inaction are to be taken as legally evidencing the abandonment of a conspiracy, it is certainly true

that such abandonment can not be inferred to have occurred at the beginning of the three-year period, but must rather be deemed to have happened at the end of the three years; with the result that the statute of limitations would begin to run from the end of the three-year period of inaction, not from its beginning. This shows also that, if the statute of limitations is used once for determining when a conspiracy has been abandoned, it must be used again for determining a later date beyond which the conspiracy may not be prosecuted; with the result of giving the statute of limitations double and fundamentally different operation.

(5) The fact that a conspiracy agreement or confederation may, and with rare if any exceptions does, continue in existence independently of the commission of any overt act under it is proved by the fundamental rule that each conspirator continues responsible for the acts of all in pursuit of the purpose of the conspiracy, without new reassertion or reestablishment of the conspiracy agreement. This mutual responsibility for the acts of any conspirator rests upon and grows out of the continuing agreement or confederation. Otherwise it can have no basis whatever, and is radically wrong. Whence does the mutual agency of the conspirators come, if not from the continuing consent of each conspirator to the acts of all; and whence does that continuing consent come, if not from the continued existence of the conspiracy agreement? This aspect of the matter ought to be decisive.

(6) Even when the single overt act required by section 5440 before prosecution occurs outside of the jurisdiction of the court where the indictment is found, prosecution in that court is proper if the conspiracy agreement was there formed or has there existed. (*Dealy* v. *United States*, 152 U. S., 539.)

This shows that even the first overt act is not of the gist of the offense. *A fortiori*, subsequent overt acts are not.

And why is prosecution also possible within the jurisdiction where any overt act is done? Not because that overt act is itself the offense or because it is even a part of the offense, but because the conspiracy agreement is deemed to exist wherever, with the consent of the conspirators, action is taken under it.

(7) It is sometimes said in the books that each overt act "renews" the conspiracy. That is true only in the sense that the overt act constitutes renewed or further evidence of the continued existence of the conspiracy. The statement is not true if it means that each new overt act creates a new conspiracy; for there can be no such thing as an overt act in pursuance of a conspiracy without a precedently existing conspiracy. A so-called overt act can not itself create a conspiracy. It may be a wrong act in itself, but it will not support a charge of conspiracy unless it follows an actual conspiracy agreement or confederation. The act can not even be charged to any person but the individual who does it, unless his agency for others in doing it has been created by a

previous mutual understanding. Further, if each overt act makes a new and separate conspiracy—instead of all overt acts being referred to a single continuous conspiracy contemplating the object in pursuit of which the overt acts are done—then there may be as many prosecutions as there are overt acts, instead of a single prosecution for the continuing confederation by reason of which the acts are done.

What more can be necessary in support of the propositions that a conspiracy agreement or confederation may, and commonly does, continue in actual existence for substantial and varying periods after the last overt act that happens yet to have been done under it; that its actual continuance is a question of fact; that this indictment charges continued actual existence of the conspiracy up to the time of indictment; and that no legal inference of abandonment of the conspiracy can be made by the court in disregard of the express allegation of the indictment that it did continue until the indictment was found, and in further disregard of the alleged and plain object of the conspiracy—to keep the Pennsylvania Company indefinitely out of competition with the American Company—and in further disregard of the complete irrelevance of the statute of limitations to the question whether a conspiracy agreement has actually been abandoned through inaction for a time, and in further disregard of the obvious impropriety of holding that conspiracies of all kinds, whatever their terms and their purpose and their plan of action, must be held uniformly terminated (in spite even of express

agreement of the conspirators to the contrary) by three years of inaction?

There is no Federal authority that an overt act must occur within three years of the indictment, though the conspiracy agreement continues through those three years; unless that view is implied in the holding by two district judges that the statute of limitations runs from the first overt act, though there be later overt acts within three years. In this court the application of the statute of limitations to conspiracies seems never to have been considered in any aspect. The cases in the lower Federal courts may be conveniently grouped as follows:

(*a*) Practically all the cases hold that prosecution is not barred if an overt act has occurred within three years.

United States v. *Raley*, 173 Fed., 159; 165, 166.

United States v. *Breese*, 173 Fed., 402, 411.

Jones v. *United States*, 162 Fed., 417; 425–427.

United States v. *Lonabaugh*, 158 Fed., 314, 319.

United States v. *Barber*, 157 Fed., 889.

United States v. *Bradford*, 152 Fed., 616, 617.

United States v. *Brace*, 149 Fed., 874.

United States v. *Bradford*, 148 Fed., 413.

United States v. *Greene*, 115 Fed., 343, 355.

Lorenz v. *United States*, 24 App. D. C., 337; 387, 388.

To like effect:

Insurance Companies v. *State*, 75 Miss., 24; 35–38.

Ochs v. *People*, 124 Ill., 399, 429.
People v. *Willis*, 23 Misc. (N. Y.), 568, 573.

The foregoing Federal cases do not hold that an overt act within three years is necessary, if the conspiracy still continues; but they hold only that the coexistence of the conspiracy and an overt act within three years is sufficient. The cases did not involve the question now under discussion, for in each case an overt act had been done within three years. The attention of the court was directed in all these cases to the single question whether the statute runs from the first overt act, and that question was answered in the negative.

(*b*) The case of *Ware* v. *United States* (154 Fed., 577), decided the identical thing held in the many cases above cited. I mention it separately because Judge Sanborn there stated that the conspiracy and the overt act must coexist within three years; but so far as this statement indicates that an overt act must happen within three years, it was pure *dictum*. The court held that an overt act had occurred within three years, and consequently the court neither did nor could decide that a conspiracy still existing within three years could not be prosecuted if an overt act had not been done within three years.

On principle, too, the statement of Judge Sanborn is wrong. The considerations already presented suffice to show the error. A single concrete illustration may be made: Suppose that a conspiracy is formed January 1, 1905, which by the express agreement of the conspirators is to last for four years, or

which by the express agreement of the conspirators contemplates action for a few days at once and then again in the fourth year after an interval of inaction. Suppose, further, that a single overt act is done January 2, 1905, so as to satisfy section 5440. Is the conspiracy beyond prosecution after January 2, 1908, before overt acts are again done under it?

(*c*) In the case of *United States* v. *Black* (160 Fed., 431) the decision was that the statute of limitations is a bar when the conspiracy ended, by attainment of its purpose, more than three years before indictment and (as necessarily followed) without an overt act done within the three years. This is of course correct, because the conspiracy agreement itself had ended.

(*d*) We have left two decisions by district judges Deady and Quarles that the statute runs from the first overt act, though there be other overt acts within three years.

United States v. *Owen*, 32 Fed., 534.
Ex parte Black, 147 Fed., 832.

These cases are obviously wrong; are opposed to the great number of cases above cited; the *Owen* case was overruled by the Court of Appeals for the Ninth Circuit in *Jones* v. *United States* (162 Fed., 417); and the Court of Appeals for the Seventh Circuit decided the *Black* case, as already stated (160 Fed., 431), on other grounds than Judge Quarles took.

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The case of *United States* v. *McCord* (72 Fed., 159), reporting a charge by District Judge Bunn to a jury, was cited by Judge Quarles in the *Black* case as the basis of his own holding, but is not pertinent because there was no proof of an overt act within three years (p. 162).

This review of the cases will show that not only is the point now urged still open, viz, that an overt act within three years is not necessary if the conspiracy agreement then still continues, but the tendency of the lower Federal cases is toward the right rule.

The case of *United States* v. *Irvine* (98 U. S., 450), upon which the circuit court relied in this case, has no pertinence whatsoever. It was there held that the offense of "withholding" pension money is not a continuous offense, but is complete as soon as demand for the money is wrongfully refused. That is far from a conspiracy case. A conspiracy agreement continues because it contemplates and is intended by the conspirators to produce wrongful action in the future. The full and real injury from it does not happen until the conspiracy's object is attained. The wrongful withholding of pension money works the full injury at once; and it has no tendency or purpose, like a conspiracy, to induce subsequent wrong or injury.

The Pennsylvania case of *Commonwealth* v. *Bartilson* (85 Pa. St., 482) holds two things: (1) That a count of an indictment alleging that a conspiracy has been renewed by an overt act done under it alleges a new, separate conspiracy, and that therefore the count is duplicitous, and (2) that a count which al-

leges existence of the conspiracy at the time of the overt act, but not a renewal of the original conspiracy, is good when both conspiracy and overt act exist within the limitation period. The former of these holdings seems an absurd piece of verbalism, and the second holding does not bear upon the question whether an overt act within the limitation time is requisite, if the conspiracy still exists.

B. Concerning conspiracies to restrain interstate commerce under the Sherman Act (26 Stat., c. 647, p. 209)—

Only two things need here be added to the treatment of conspiracies generally.

(1) The Sherman Act makes a conspiracy in restraint of commerce or to monopolize commerce an offense without the occurrence of even a single overt act.

(*a*) Section 5440 of the Revised Statutes is inapplicable. The condemnation of conspiracy as a crime by the Sherman Act is a special case, outside of and different from section 5440. The punishment under the two laws is different; being less under the Sherman Act. If Congress had meant that an overt act should be necessary before prosecution for a conspiracy to restrain commerce, it had before it the example of the express requirement of an overt act under section 5440 and would have repeated that requirement in the Sherman Act.

(*b*) The terms of the Sherman Act must be construed in the light of the common law. "Conspiracy" in that act must be what it was at common law, as

respects its elements. As already seen, no overt act was necessary to a prosecution for conspiracy at common law; and this common-law rule obtains concerning prosecutions for conspiracy under the Sherman Act.

(*c*) The words "in restraint of trade" in the statute mean "for the purpose of restraining trade." The very phrase is taken from the common law, which grouped a certain class of contracts under the well-known name of "contracts in restraint of trade." That name covered contracts whose purpose was to restrain trade, whether or not they had yet actually so resulted. A contract is in restraint of trade from its initial execution, if ever. Further, it is inconceivable that Congress meant a contract or conspiracy in restraint of trade to go unpunished until it had been allowed to succeed so far as actually to restrain trade. Still further, the second section of the Sherman Act punishes not only established monopolies, but any "attempt to monopolize" and any conspiracy "to monopolize," whether monopoly has yet resulted or not.

(2) The fact that conspiracies generally may be and usually are continuing agreements or understandings, as already shown, is emphatically true of conspiracies to restrain or to monopolize commerce. In such cases not only may the conspiracy endure, as in the case of conspiracies generally, until a single complete result is effected, but the result intended by the conspirators is itself, quite inevitably, a continuing condition of things. Restraint or monopolization

of commerce for a moment or a day is not the object of a conspiracy to restrain or monopolize it; the conspirators seek continuous restraint and monopolization. This indictment charges that defendants sought such continuing result.

Certain decisions of this court illustrate the continuity of offenses under the Sherman Act. In *United States* v. *Trans-Missouri Freight Association* (166 U. S., 290) the contract forming the defendant association had been made before the Sherman Act was passed, but a continuance of the association after enactment of the statute was held to be within the statutory prohibition. Mr. Justice Peckham said:

> It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect; that the contract at the time it was entered into was not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of an act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery, and agree to certain method for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and if the agree-

> ment be continued it then becomes a violation of the act. There is nothing of an *ex post facto* character about the act. The civil remedy by injunction and the liability to punishment under the criminal provisions of the act are entirely distinct, and there can be no question of any act being regarded as a violation of the statute which occurred before it was passed. After its passage, if the law be violated, the parties violating it may render themselves liable to be punished criminally; but not otherwise (p. 342).

In *Northern Securities Company* v. *United States* (193 U. S., 197) the court restrained continuance of a combination already formed. This must have been because such continuance of the combination was condemned by the act as much as its formation.

In *Loewe* v. *Lawlor* (208 U. S., 274) damages were awarded for losses caused by continuance of a conspiracy in restraint of trade, because the conspiracy was a continuing wrong.

Judge Hough, in the Circuit Court, overruled a demurrer to an indictment for violating sections 1 and 2 of the Sherman Act, which claimed that the indictment was bad for duplicity and indefiniteness, and he said:

> It is true that the gist of the alleged offenses is the combination or the attempt at monopoly, but it is not true that the offenses are complete when the combination is mentally formed or the mental intention to monopolize arises. The statutory offense, and the one charged herein, does not depend upon "a

single agreement, but [on] a course of conduct intended to be continued;" yet, nevertheless, "the thing done and intended to be done is perfectly definite." (*Swift* v. *United States*, 196 U. S., p. 400; 25 Sup. Ct. 281, 49 L. Ed., 518.) That case arose on the civil side of the court, but it is to be remembered that the same facts and acts which expose violators of this statute to civil suit also render them subject to indictment. In this case, while the time is indefinite, the thing done is definite, and that is all that the statute requires.

To show that an exact time may be, and therefore must be, assigned for the commission of the offense of combination, the defendants argue upon the meaning of the word "engage" as used in the statute, and strenuously urge that since the offense prohibited is that of "engaging in" a combination, it must be complete as soon as the accused employs his attention or effort in or about the same, that such employment of attention or effort is capable of precise assignment in point of time, and they challenge the prosecution to name the day.

The statute is not directed against such an abstraction as this. It does not require on the part of the prosecution clairvoyance to discover or locate the offense. Its prohibition is not directed against a state of mind, but against a state of facts. The facts do not simultaneously occur; the events are not contemporaneous. It may, and naturally would, require time for the working parts of the combination to become cooperative, or

> for the monopoly to become more than a hope; and what is forbidden and renders the actors obnoxious to the criminal law is not an undiscoverable thought or hope, but a perfectly obvious result or condition. The condition or state of facts against which the statute is directed is a continuing condition, and therefore the offense of creating and maintaining that condition is necessarily a continuing offense, and does not, from its very nature, require greater particularity in assignment than is used in this indictment. (*United States* v. *MacAndrews & Forbes Company*, 149 Fed., 823, 830.)

II.

If an overt act within three years before the finding of the indictment was necessary, many such acts are charged in the indictment.

A. The overt acts alleged to have been done within three years by others than Kissel and Harned themselves will first be considered. As the conspiracy is alleged to have existed on the part of all defendants up to the very time of the indictment, it of course results that any overt act done by any one of the conspirators within three years of the indictment is chargable to all the conspirators.

1. The overt acts charged to have been done by others than Kissel and Harned within three years are:

(*a*) On February 13, 1907, four of the defendants, directors of the American Company, attended a meeting of the directors of that company and each voted

for "and thereby secured the adoption of" resolutions agreeing to assume "the entire responsibility of" and to defend, protect, and "indemnify" both President Havemeyer of the American Company and Mr. Parsons, its counsel and a defendant herein, against all consequences of "what has occurred in the Segal matter," and further agreeing that in the event of a suit and possible recovery the company would pay what was recovered and, in case of appeal, procure a stay. (Rec., 15, 16.)

(*b*) On February 15, 1907, defendant Parsons wrote the American Company agreeing that he would "both on the company's account and on my own cooperate in defending any proceeding which may be taken by Mr. Earle," who was receiver of the Pennsylvania Company. (Rec., 16.)

(*c*) On May 3, 1907, the American Company paid defendant Kissel for certain of his expenses incurred in connection with his action under the conspiracy. (Rec., 17.)

(*d*) On November 12, 1907, five of the defendants attended a meeting of the directors of the American Company; it not being alleged what particular action was taken by them at that time. (Rec., 18.)

(*e*) On April 19, 1909, defendant Parsons advised the American Company not "to submit the bonds" of the Pennsylvania Company "held by Mr. Kissel * * * to the action of a probably hostile committee," referring, of course, to some committee concerning rearrangement of the financial affairs of the Pennsylvania Company. (Rec., 18.)

2. Each of these acts is expressly charged in the indictment to have been done "in pursuance of said unlawful and corrupt conspiracy and to effect the object of the same." (Rec., 15, 16, 17, 18.)

This allegation will suffice to show—until it is disproved on a trial—that the act was in fact done to effect the object of the conspiracy, unless such act is legally incapable of so operating; and the act can not be said as a matter of law to have been incapable of being an overt act in pursuance of the conspiracy and to effect its object if the act *might* in *any* circumstances actually tend to effect the object of the conspiracy.

3. Not only might each of the foregoing five overt acts tend under some circumstances to effect the object of the conspiracy, but it is even probable in advance of evidence that they did tend actually to effect the object of the conspiracy under the circumstances which the indictment itself discloses.

(*a*) The American Company's agreement with Havemeyer and Parsons to assume all responsibility for "the Segal matter" and to protect them against its consequences would naturally operate to induce Parsons, alleged in the indictment to have been at all times a participant in the conspiracy, to continue in the courses of the conspiracy, instead of withdrawing from the conspiracy, or at any rate offering less strenuous and effective resistance to the suits and other efforts of those interested in the Pennsylvania Company. Such retention of Parsons in the conspiracy may have been the very purpose of the

promised protection; and, whether so intended or not, it would naturally operate that way. It is to be remembered also here that the full purpose of the conspiracy in keeping the Pennsylvania Company indefinitely out of business and competition had not yet been attained. More was still to be done.

It is of some significance, too, that this action of the American Company toward Havemeyer and Parsons was quite in accord with similar action whereby on January 5, 1904, the American Company agreed to hold defendant Kissel "harmless by reason of the execution of that agreement and of any action taken under it"—referring to the original agreement of December 30, 1903, which was the first great step in the conspiracy. (Rec., 15.) It can not be doubted that the purpose of this arrangement with Kissel was to induce his action in the conspiracy. Indeed, it expressly refers to "action taken under" the original Segal agreement. Why should the purpose of the promised protection to Parsons have been different?

(*b*) Parsons' letter of February 15, 1907, promising the American Company to defend any proceeding brought by the receiver of the Pennsylvania Company, was one direct response to the protection promised him two days before. This promise of Parsons, of course, as he must have intended to keep his promise, operated naturally to hold one of the conspirators in line.

(*c*) The American Company's payment on May 3, 1907, of the expenses previously incurred by Kissel

in connection with his action under the conspiracy may likewise have been designed to induce Kissel's continued fidelity to the plans of the conspiracy. Whether so actually intended or not it would naturally operate in that way. If payment had been refused to Kissel, would not that have tended to make Kissel discontinue his services to the conspiracy? For mere illustration of the importance of Kissel's continued adherence to the plans of the conspiracy let it be remembered that Kissel was holding the power of attorney to vote the stock of the American Company, by the use of which the American Company's continued choice of directors in the Pennsylvania Company and control of the latter company's action or inaction could be effected.

It may be true, as held in *United States* v. *Black* (160 Fed., 431) that payment after the object of a conspiracy has been fully attained of a conspirator's expenses in the course of accomplishing the conspiracy's object can not be an overt act; but that is because there is nothing further to be done and consequently there is no reason for inducing further action by the conspirator who receives the payment. In the present case the object of the conspiracy was still to be pursued after May 3, 1907, when the payment to Kissel was made.

(*d*) The participation of five defendants, who were directors of the American Company, in a meeting on November 12, 1907, may have tended to promote the conspiracy in any one of a hundred ways. What in particular was then done the indictment does not

allege; and therefore any possible supposition may be made as to action at that meeting in support of the plans of the conspiracy. If anything could then have been done to effect the object of the conspiracy, it must at present be deemed to have been done, because of the allegation of the indictment that defendants attended the meeting "in pursuance of said unlawful and corrupt conspiracy and to effect the object of the same." (Rec., 18.) For illustration, defendants at the meeting may then have directed or advised that Kissel be still employed to hold the power of attorney to vote the stock of the Pennsylvania Company, or that the stock still be voted in favor of directors who would act in the interest of the American Company, or that particular persons should be chosen to the directorship of the Pennsylvania Company, or that payment of Segal's debt, which was long overdue, be refused, and the American Company's retention of the Pennsylvania Company's stock and of the power to vote it be thereby continued. The conspirators, as will be recalled, were under the conspiracy agreement "to use every means in their power to extend said term" of Segal's debt remaining unpaid "and said power of control, particularly by keeping said Adolph Segal involved in debt and his affairs in such a condition as to prevent his relieving himself from his obligations to said corporation defendant, and by wrongfully and arbitrarily refusing to accept payment of such obligations from him." (Rec., 6.)

Further, at this meeting of November 12, 1907, the five conspirators present may have agreed, or incited either one of themselves or another, to any sort of action in aid of the conspiracy. They may then have determined, or issued instructions, that things be done which would prolong the bankruptcy of the American Company and the receivership established on October 2, 1906. (Rec., 33.)

(*e*) The advice given by defendant Parsons on April 19, 1909, to the American Company, that it do not "submit the bonds" of the Pennsylvania Company "held by Mr. Kissel * * * to the action of a probably hostile committee," may well have been, and probably was, calculated to retard any negotiations or arrangements for readjustment of the financial affairs of the Pennsylvania Company, with the result of shortening the time of its bankruptcy and receivership or with the result of discouraging action by stockholders or others interested in the Pennsylvania Company, and not in the American Company, for the purpose of paying off Segal's debt and so relieving the Pennsylvania Company from the thralldom of the American Company's continued power over its stock and directorship.

We thus have five acts done within three years before the indictment by the conspirators other than Kissel and Harned—each of which under the allegations of the indictment must be deemed a sufficient overt act.

B. If an overt act within three years must have been done by Kissel himself, the indictment shows three such overt acts on his part.

(*a*) Kissel continued to hold, at least until December 30, 1906, the power of attorney given him December 30, 1903, to vote the stock of the Pennsylvania Company. Thus, on January 4, 1904, he wrote the American Company that he then held this power of attorney. (Rec., 14.) Up to December 30, 1906, he certainly continued to hold the vault and continued to charge the American Company for the expense of the vault, in which he was keeping the power of attorney and the stocks and bonds of the Pennsylvania Company. (Item of December 8, 1906, in Kissel's bill of May 3, 1907; Rec., 17.) In his immunity plea Kissel shows that on or shortly after May 26, 1909, he still retained possession of the power of attorney, because on that date, in obedience to a subpœna, he produced it in court. (Rec. 36, 49.) Kissel's continued holding of this power of attorney, which was a chief foundation of the American Company's continued control over the management of the Pennsylvania Company, is an overt act of the first importance. It of course tended to effect the object of the conspiracy, because retention of the power of attorney by somebody was essential to its exercise. Further, its retention in the name and hands of some one else than the American Company was all important to the purpose of the conspiracy, for thereby secrecy was preserved as to the American

Company's being the real lender of the money advanced to Segal and being the real controller of the use of the power of attorney and of the stocks and bonds put in the hands of Kissel. Had the persons interested in the Pennsylvania Company known the American Company's relation to and control of the situation, and its real authorship of the order of its appointed directors of the Pennsylvania Company that the latter company "refrain from carrying on its business until the further order of said directors" (Rec., 10, 11), such knowledge would have tended in the strongest way to impel the persons interested in the Pennsylvania Company to raise funds to pay off Segal's debt and thereby destroy the power of attorney and the pledge of stock or to take legal action in attack upon the mismanagement of the Pennsylvania Company's affairs in the interest of the American Company by the directors which the latter had chosen. Kissel's continued holding of the power of attorney and the securities of the Pennsylvania Company was a means of keeping all interested in the Pennsylvania Company ignorant of the American Company's relation to the whole affair, and it therefore tended as strongly as anything could to guard the conspirators against financial or legal efforts on the part of those interested in the American Company to break up the American Company's control.

Indeed, the indictment expressly charges that it was the plan of the conspirators to have the power of attorney and stock given to Kissel as the agent

of an undisclosed principal, "without said Adolph Segal being aware of the fact that said corporation defendant would be the real lender of such sum of money to him, and without his suspecting the designs of said corporation and individual defendants in the premises, or having reason to suppose that such undisclosed lender would have any other desire but one to obtain interest upon and the repayment of such sum when due, or any motive for preventing the said Pennsylvania Sugar Refining Company from carrying on its said intended business, trade, and commerce, and thereby earning profits and paying dividends to its stockholders in such a way as to enable said Adolph Segal to pay such interest and repay such principal sum so to be borrowed." (Rec., 5, 6.)

(*b*) At least until December 30, 1906, Kissel continued to hold the stock and bonds of the Pennsylvania Company, beside the power of attorney; and this stock was a majority of all the stock of the Pennsylvania Company. The proof that Kissel continued to hold the power of attorney at least until December 30, 1906, applies also to the stock and bonds; and defendant Parsons stated in his letter of April 19, 1909, that Kissel held the bonds at such last-named date.

This again helped forward the object of the conspiracy by tending to keep the American Company's relation to and control of what was going on unknown to those connected with the Pennsylvania Company.

(c) On May 3, 1907, Kissel demanded, and on May 10, 1907, he received, payment by the American Company of certain expenses in connection with his action under the conspiracy. As already shown, these transactions tended to keep Kissel a member of the conspiracy and to induce his continued service in aid of the conspiracy.

C. No overt act within three years is shown on the part of defendant Harned; but he is responsible, by reason of the continued existence of the conspiracy agreement or confederation up to the finding of the indictment on the part of all defendants, for all the overt acts done within three years by any of the other conspirators.

FIFTH.

If a special plea of the statute of limitations may raise any issue of fact at all, that issue must be solely concerning the time of the offense charged in the indictment. Defendant's plea, beside seeking to question the time of the offense, expressly traverses that any of the overt acts which the indictment alleges to have been done within three years were of a character tending to effect the object of the conspiracy, and also traverses defendant's participation at any time in any such overt acts; and further attempts to make an argumentative denial that the Pennsylvania Company's elimination from competition with the American Company was caused by the conspiracy after the receivership of October 2, 1906. The plea is therefore duplicitous in that, beside questioning the time of the offense, it denies allegations of the indictment which only a plea of not guilty can dispute.

1. The traverses made by the plea on other points than time of offense are:

(*a*) "That the acts and things alleged in said indictment to have been done within said period of three years, whether by him or by others, were not acts or things in aid or furtherance of or tending to effect the object of any such conspiracy or conspiracies." (Rec., 32.) This disputes the organic relation of such acts to the conspiracy, whenever done.

(*b*) "That the alleged overt acts and things averred in said indictment to have been done * * * within three years next preceding the finding of said indictment * * * were each and all of them done without this defendant's participation, knowledge, consent, agreement, authority, or ratification." (Rec., 32, 33.) This denies any assent of defendant to such overt acts, whenever done.

(*c*) The plea asserts that after October 2, 1906, the Pennsylvania Company's property and affairs were under a receivership and that its officers were enjoined from intermeddling with the property. (Rec., 33, 34.) The effect claimed for these facts is not stated by the plea; but the purpose of the averments can be only to deny argumentatively that after October 2, 1906, the Pennsylvania Company was kept out of business as a result of the conspiracy.

2. The impropriety of such traverses and additions to a mere issue on the single point of the time when the things alleged in the indictment occurred

is shown by the fact that a plea of the statute of limitations certainly can not have in criminal procedure a wider scope than it is allowed in a civil case. The authorities on this point, beside the special effect of the Criminal Appeals Act upon the question, are stated on pages 20–30, *ante*. I repeat only the explicit statement of Stephen concerning civil pleading that union of matter in confession and avoidance and a traverse in the same plea makes it duplicitous. (Stephen on Pleading, 9th Am. ed., by Heard, 258.)

SIXTH.

Whatever may be the permissible office of plea of the statute of limitations in a Federal criminal case, the true construction of this plea is that it does not absolutely deny the existence of a conspiracy within three years, but asserts that no conspiracy existed within that time if no overt act was done within three years; and, as shown in the Fourth Point (pp. 32–56, ante), absence of an overt act within three years does not show nonexistence of the conspiracy within that time.

1. The rule, of course, is that the plea must be construed more strongly against the pleader. (*United States* v. *Linn*, 1 How., 104, 110, 111.)

2. In particular, a special plea of the statute of limitations in a criminal case should be construed with rigor against defendant; because he can make the same defense under a plea of not guilty, and he ought not to be allowed any advantage from a special plea which is uncertain in the least degree. Maintenance of the special plea against the Government will end the prosecution, unless this court

itself allows the Government to plead over; while, if the special plea be overruled, no harm can come to defendants.

3. It is fairly obvious from the whole plea that its theory is that there was no conspiracy within three years because no overt act was done within that time. The coupling of the assertion that defendant did not participate in a conspiracy within three years with the repeated and varied claims that no overt act occurred within that time shows the vital relation of the two positions.

In particular, why does the plea deny that the overt acts alleged by the indictment to have been done by others than Kissel and Harned within three years had any organic relation to the conspiracy? If the conspiracy did not itself exist within three years on defendant's part, it could make no difference whether the other defendants did anything within that time or what sort of thing they did. Likewise, why does the plea deny that Kissel's own admitted acts within three years were of a kind to promote the conspiracy; when, if the plea was intended to deny absolutely that he was a member of the conspiracy within three years, it was quite immaterial whether his admitted acts within that time were of a kind to promote the conspiracy, because the acts anyway must have been done innocently by Kissel if he was not in the conspiracy.

Conclusively, however, the indictment alleges that each overt act done within three years was done "*in pursuance* of said unlawful and corrupt conspiracy,

and to effect the object of the same." This assertion is repeated every time. (Rec., 7, 9–11, 13, 15–18.) Kissel does not deny that his own admitted acts within three years were "in pursuance of" the conspiracy. Notwithstanding the repetition of the phrase in the indictment, he carefully limits his claim to a statement that the acts done within three years, *whether by him or others*, "were not acts or things in aid or furtherance of or to effect or tending to effect the object of any such conspiracy or conspiracies." (Rec., 32.) The difference is that Kissel does not deny that his acts within three years were done *with an intent* to promote the conspiracy, but limits his claim to the point that his acts did not in fact operate to promote the conspiracy. Indeed, Kissel could hardly himself deny that *others* than himself were in the conspiracy within three years and intended to promote it; and he does not deny that the other defendants were all the time in the conspiracy. How, then, could he deny their intent as to any of their acts? And his denial as to his own overt acts is no wider than his denial concerning the overt acts of others. Also, it is noticeable that Harned does not narrow his denial as Kissel does, but asserts that he did nothing within three years "in pursuance or ratification of or to effect or tending to effect the object of any conspiracy." (Rec., 52.) We get then to the point that, unless the plea is to be construed liberally rather than strictly and its uncertainties are to be resolved in favor of defendant, Kissel does not deny that his acts with-

in three years were done *with intent* to advance the conspiracy. The general averment of the plea that Kissel did not participate in any conspiracy within three years will therefore be inconsistent with his failure to deny that his own acts within three years were done with intent to advance the conspiracy, unless such general averment is taken as asserting merely that no conspiracy existed on his part within that time *because* neither he nor the others did any act within that time which actually tended to promote the conspiracy. In other words, the negation of the conspiracy's existence within three years is based upon the supposed legal rule that the conspiracy ceases to exist if within three years no act is done which actually tends to promote the object of the conspiracy. That theory, as already argued, is entirely unfounded.

The plea, then, is bad on its face, unless it is helped by the averments that after October 2, 1906, the Pennsylvania Company's property and affairs were in the hands of a receivership and its officers were enjoined from intermeddling with its property. (Rec., 33.) Those averments can avail nothing.

The conspiracy might nevertheless exist and acts might still be done under it, whether in the general way of prolonging the receivership itself, or in the way of ruining the Pennsylvania Company utterly, or in the way of continuing the American Company's domination over the management of the Pennsylvania Company, either during or at the end of the receivership.

SEVENTH.

Even if the plea be held good on the ground that, though the indictment is good on its face, the plea can and does make an issue on the point whether the offense occurred within three years of the indictment and is also not duplicitous, because it adds other issues or attempts at issue to the issue of time, still the judgment of the Circuit Court should be modified by this court so as to allow the United States, upon remission of the case to the Circuit Court, to traverse the plea by replication and so obtain a trial of the question whether in fact the offense occurred within three years.

This court has full power now to modify the judgment "as the justice of the case may require." (Rev. Stat., sec. 701.)

The action of the district attorney in not asking of the Circuit Court leave to plead over was natural and proper in view of the fact that the Circuit Court actually treated the plea as a demurrer and held the indictment bad on its face. No replication to the plea, in that view of its operation, was necessary or appropriate. Further, a trial upon a replication would have been useless in the Circuit Court in advance of a decision by this court that the Circuit Court erred as to the law, and the indictment is good on its face. Upon such a trial the Circuit Court would simply repeat its decision that the indictment is bad, and the delay and expense of the trial would have been had for nothing.

The same thing will be true if this court now omits to settle the questions of law concerning the suffi-

ciency of the indictment and merely remands the case with leave to the United States to plead over.

CONCLUSION.

The judgment of the Circuit Court should be reversed; and if reversal is not proper, the judgment should at least be modified so as to permit the United States to make replication to the plea.

LLOYD W. BOWERS,
Solicitor-General.

SEPTEMBER, 1910.

APPENDIX.

In view of the rarity of the special plea of the statute of limitations, and to illustrate the unprecedented form of the defendants' pleas, the Government presents the following typical examples of that plea in Federal criminal practice:

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES
v.
HENRY HEWECKER.

Now comes the defendant, Henry Hewecker, in person, and having heard the said indictment read, says:

That the United States ought not to further prosecute or try the said indictment against him, the said Henry Hewecker, because, he says, that it appears that the indictment herein was not found until the 10th day of March, 1896; that it appears upon the face of said indictment to be charged that the said defendant, Henry Hewecker, did, on the 17th day of January, 1892, on board the American schooner *Rebecca J. Moulton*, in the harbor of Havana, off the island of Cuba, with a certain revolver shoot one Edward J. Miller, inflicting a wound, from which wound the said Edward J. Miller thereafter, and on the 21st day of January, 1892, on land, in the hospital in Cuba, without the United States, did die, and said defendant alleges that said death took place more than three years prior to the finding of said indictment.

That such charges, if true, do not, under the laws of the United States, constitute the crime of willful murder, and that, therefore, under and by virtue of section 1043 of the Revised Statutes of the United States, this defendant should not be prosecuted or tried.

The said defendant, for a further plea, says that from the 17th day of January, 1892, and until the date of the finding of the said indictment, he had not fled from justice, but that he had been in the meantime, and at all the times between said dates, confined in the prison at Havana, Cuba, under a charge and a conviction for an assault inflicted in the city of Havana, and the said defendant, therefore, says that the offense with which he is charged by the said indictment is barred by the statute of limitations, and that the United States ought not to further prosecute the same, and that he, the said Henry Hewecker, is ready to verify the same; and wherefore he prays judgment that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified.

HENRY HEWECKER.

(*United States* v. *Hewecker*, 164 U. S., 46; S. C. 79 Fed., 59; Rec. U. S. Sup. Ct., p. 7.)

SPECIAL PLEA.—UNITED STATES CIRCUIT COURT.

THE UNITED STATES OF AMERICA
v.
GEORGE W. KIRK, INDICTED WITH HERMAN HIRSCH, MORRIS HESS, AND OTHERS.

In the matter of the indictment against George W. Kirk, who is jointly indicted with Herman Hirsch,

Morris Hess, Charles L. Lawrence, and Robert Des Anges, for conspiracy and entry by false samples, etc.

And the said George W. Kirk, in his own proper person, cometh into court here, and having heard the said indictment read, says that the United States of America ought not further to prosecute the said indictment against him the said George W. Kirk, because he says that the several acts alleged constitute the several offenses in said indictment charged did not, if at all, arise, exist or accrue within two years next last before the finding of said indictment, to wit:

The said indictment avers the commission of said several acts or offenses on various days from the 1st day of September, 1873, and subsequently to the 13th day of September, 1874, to wit, on the 1st day of September, 1873, on the 13th day of September, 1873, on the 14th day of September, 1873, and on the 13th day of September, 1874, and that said indictment was not found, presented, or filed until February 3, 1877, and this the said George W. Kirk is ready to verify.

Wherefore he prays judgment, and that by this honorable court here he may be dismissed and discharged from the said premises in the said indictment specified and alleged.

GEORGE W. KIRK.

GEORGE H. FORSTER,
Of Counsel for the Defendant.

(*United States* v. *Hirsch*, 100 U. S., 33; Rec., pp. 5, 6.)

(Indorsed:) U. S. Circuit Court. The United States vs. George W. Kirk, indicted with Herman Hirsch, Morris Hess, et al. Copy special plea. George H. Forster, of counsel, 58 Wall st. Filed May 19, 1877.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES
v.
HERMAN HIRSCH AND MORRIS HESS,
Impleaded, etc.

And the said Herman Hirsch and the said Morris Hess, each in his own proper person, comes into court here, and having heard the said indictment read, say, each for himself, that the said United States ought not further to prosecute the first and second counts of said indictment against him the said Herman Hirsch, or him the said Morris Hess, because they say, each for himself, that the conspiracies, combinations, confederations, and agreements in the aforesaid counts of said indictment charged, alleged, and set forth, as well as the acts, matters, and things therein charged, and alleged to have been done in pursuance of said conspiracies, combinations, confederations, and agreements, were made, entered into, performed, and completed, and the offenses charged in said counts of said indictment were committed, more than three years before the aforesaid indictment was found. And this they, the said Herman Hirsch and the said Morris Hess, are ready to verify; wherefore they pray judgment, and that by the court here they may be dismissed and discharged from the said premises in the said first and second counts in the said indictment specified.

G. W. KIRK.
HERMAN HIRSCH.
MORRIS HESS.

(*United States* v. *Hirsch*, 100 U. S., 33; Rec., p. 6.)

UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES
v.
JOHN W. NORTON.

In the matter of the indictment against John W. Norton for embezzlement, etc.

SPECIAL PLEA.

And the said John W. Norton, in his own proper person, cometh into court here, and having heard the said indictment read, says that the United States of America ought not further to prosecute the said indictment against him, the said John W. Norton; because, he says, that he is not a person who has fled from justice, and that the several acts alleged to constitute the several offences in said indictment charged did not, if at all, arise, exist, or accrue within two years next last before the finding of said indictment, to wit:

The said indictment avers the commission of said several acts or offenses on various days from the 1st day of August, 1871, and subsequently to the 25th day of October, 1800, to wit, on the 1st day of August, 1871; the 31st day of March, 1870; the 1st day of August, 1871; the 3d day of August, 1871; the 11th day of August, 1869; the 20th day of September, 1869; the 20th day of September, 1869; the 28th day of September, 1869; the 28th day of September, 1869; the 22d day of January, 1870; the 22d day of January, 1870; the 2d day of March, 1870; the 2d day of March, 1870; the 7th day of February, 1870; the 7th day of February, 1870; the 27th day of

January, 1870; the 27th day of January, 1870; the 31st day of March, 1870; the 21st day of March, 1870; the 17th day of March, 1870; the 17th day of March, 1870; the 10th day of March, 1870; the 30th day of April, 1870; the 30th day of April, 1870; the 19th day of April, 1870; the 19th day of April, 1870; the 1st day of April, 1870; the 1st day of November, 1870; the 1st day of November, 1870; the 3d day of August, 1871; the 3d day of August, 1871; the 26th day of October, 1800; the 26th day of October, 1870; the 3d day of August, 1871; the 3d day of August, 1871. And that said indictment was not found, presented, or filed until February, 21, 1874; and this, he, the said John W. Norton, is ready to verify.

Wherefore he prays judgment, and that by this honorable court here he may be dismissed and discharged from the said premises in the said indictment specified and alleged.

JOHN W. NORTON.

(*United States* v. *Norton*, 91 U. S., 566; Rec., pp. 17, 18.)

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA.

THE UNITED STATES OF AMERICA, Plaintiff, *v.* GEORGE W. BRACE AND ALBERT B. Young, defendants.	Special plea No. 4352.

And now comes the said Albert B. Young, in his own proper person, into court, and having heard read the indictment presented and found against him by the grand jurors of the United States of America, within and for the district aforesaid, and filed herein

on the 8th day of September, 1905, says that the said United States ought not further to prosecute said indictment against him, the said Albert B. Young, because he says that the crime set forth and alleged in said indictment is barred by the provisions of section 1044 of the Revised Statutes of the United States of America, in that more than three years had elapsed between the commission of said alleged crime and the finding of said indictment; to-wit, three years and eighty-nine days. And in this behalf, defendant alleges: That during all of said time between the commission of said alleged crime and the finding of said indictment, the said Albert B. Young was within the jurisdiction of the United States and subject to the process of said court, and at no time during said time was he a fugitive from justice or was he "fleeing from justice" within the meaning of section 1045 of the Revised Statutes of the United States. That at no time between the commission of said alleged offense and the filing of said indictment herein did the said defendant Albert B. Young leave his home or residence or known place of abode with intent to avoid detection or punishment for any public offense against the United States or any State or Territory; that at no time since the commission of said alleged crime did the defendant flee from justice or was he fleeing from justice with intent to avoid detection or punishment for any public offense against the United States or any State or Territory.

Wherefore, he prays judgment that he may be dismissed and discharged by this court from the said premises and the said indictment above specified.

J. F. QUINN,
Attorney for Albert B. Young.

STATE OF CALIFORNIA, } ss.
County of Humboldt. }

Albert B. Young, the defendant named in said indictment and in this prosecution, being first duly sworn according to law, makes oath, deposes, and says that the foregoing plea is true in substance and matter of fact, and that the said defendant has always been subject to the process of this court, and at no time between the 10th day of June, 1902, and the finding of said indictment was he a fugitive from justice or was he fleeing from justice within the meaning of section 1045, Revised Statutes of the United States.

ALBERT B. YOUNG.

Subscribed and sworn to before me this 23d day of January, 1906.

GEO. T. ROLLEY,
Notary Public, in and for the
County of Humboldt, State of California.

(Taken from the Government's files and quoted in part in *United States* v. *Brace*, 149 Fed., 874, 876, 877, 878.)

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60106—10——6

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
GUSTAV E. KISSEL AND THOMAS B. Harned. } No. 390.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

This brief is filed as supplemental to the brief prepared by the late Solicitor-General, and in reply to arguments presented in brief filed by counsel for defendants, and it is not intended herein to waive any point or argument made in the Government's said original brief.

65302—10——1

I.

The court erred in not sustaining the demurrers to the specific pleas of the statute of limitation; or if he deemed the pleas admissible, in not of his own motion incorporating them into the plea of not guilty and postponing their hearing to the trial of the case; or, in case defendants waived all other defenses, in not submitting the issue presented in the pleas to trial by jury.

Kissel and Harned first filed pleas of not guilty, but these pleas were subsequently withdrawn. (Rec., p. 31.) Thereupon these special pleas of the statute of limitation were filed.

The only ground stated in the demurrers to the pleas was "that the facts as set forth therein in effect constituted a plea of not guilty." (Rec., pp. 54, 55.)

With this simple question before him and without making any inquiry, either in person or by a jury, into the actual facts as to when the offenses alleged in the indictment were committed, the court delivered a lengthy opinion in which he held that, taking the allegations in the indictment as to time as true, the offenses were barred, and therefore ordered the indictment to be quashed as to these defendants.

The sufficiency of the indictment in every other particular was not questioned. The pleas conceded, and the court treated, the several counts as properly alleging the offenses therein mentioned, but made this summary disposition of the case solely upon the face of the indictment. Such action of the court was wholly unauthorized.

In *United States* v. *Cook* (17 Wall., 168, 179) this court held that the defense of the statute of limitation could not be made by demurrer, the reasons for so holding being thus stated:

> Accused persons may avail themselves of the statute of limitations by special plea or by evidence under the general issue, but courts of justice, if the statute contains exceptions, will not quash an indictment because it appears upon its face that it was not found within the period prescribed in the limitation, as such a proceeding would deprive the prosecutor of the right to reply or give evidence, as the case may be, that the defendant fled from justice and was within the exception. *Nor is it admitted that any different rule would apply in the case even if the statute of limitations did not contain any exception, as time is not of the essence of the offense; and also for the reason that the effect of the demurrer, if sustained, would be to preclude the prosecutor from giving evidence, as he would have a right to do, under the general issue, to show that the offense was committed within two years next before the indictment was found and filed.*

It is true the demurrer before the court was to the pleas and not to the indictment, but the court treated the case precisely as if the pleas were demurrers to the indictment, and the effect was exactly the same as if he had sustained them as such. The court can not be permitted to do, by indirection, what he could not have done directly, and thus deprive the United States of the right of proving when the

offenses were actually committed, regardless of the dates alleged in the indictment, which, as held in the *Cook* case, it had a perfect right to do. If the court was right in holding that the pleas were admissible, yet he was wholly wrong in giving them such scope and effect.

But it is now insisted that the court properly pronounced a final judgment, because the United States attorney did not offer to plead over when the demurrers were overruled. The record shows, however, that this contention is a mere afterthought, and no such idea was in the minds of counsel upon either side, or was for a moment entertained by the court.

The judgment pronounced by the court was that the demurrers interposed by the United States to the special pleas—

> be, and the same hereby are, severally overruled; and that said pleas be, and the same hereby are, severally sustained as sufficient in law, and that the said motion be denied, and that the indictment so found and filed July first, 1909, against the defendants above named be and the same hereby is dismissed as to the defendants Gustav E. Kissel and Thomas B. Harned. (Rec., p. 66.)

The judgment was entered twice in substantially the same form, except that as resettled and reentered it recites:

> * * * and the United States having also moved that the said special plea of defendant Harned be treated as a plea of not guilty. (Rec., p. 62, 66.)

An explanation was, however, entered by the court, in which it was recited:

> * * * that at no time prior to the entry of said order and judgment or to the re-settlement thereof, as aforesaid, was any suggestion made by the United States to the court or to the defendants' attorneys that the United States did not intend and elect to stand on its demurrer; but desired to plead over and traverse the special pleas in bar, and that no application or motion was at any time made to the court by the United States for leave to plead over and traverse the allegations of the defendants' special pleas in bar. (Rec., p. 70.)

It can not be seen how the additional recital in the judgment as resettled, or the fact that no suggestion was made by the United States attorney that he did not intend to stand on his demurrer and did not ask that he be permitted to traverse a special plea in bar is material. No formal motion by the United States attorney that the special plea be treated as a plea of not guilty was necessary, as that was the identical point raised in the demurrer, and the court substantially so held, in that he held that the defense could be made under the general issue; and there was therefore nothing for him to do but to order the plea to stand as one of not guilty. *Moreover, the court gave the United States no opportunity for making an application to plead over, because in closing his opinion he said:*

> *The demurrers to the pleas in bar interposed by the defendants Kissel and Harned are over-*

ruled, and judgment dismissing the indictment as to said defendants may be entered. (Rec., p. 61.)

The judgment as originally entered follows precisely the direction here given by the court. *Furthermore, no judgment by default was taken by the defendants and consequently the allegations of the plea can not be considered as taken for confessed.*

However, the opinion of the court shows conclusively that the indictments were dismissed upon the ground that the case as made out upon the face of the indictment was barred by the statute of limitation, and no one had any thought at the time that the indictment was dismissed on the ground that the United States attorney did not ask to be permitted to plead over. In fact, the usual course is, when an order is entered overruling a pleading, for the court to order that a certain time be allowed to enter a traverse; and if this is not done within the required time, then, at the instance of opposing counsel, a judgment by default may be entered.

II.

Nature of a continuing offense, and when the statute of limitation begins to run with reference thereto.

For a proper consideration of this indictment it is important to understand the nature of a continuing offense and when the same is barred by the statute of limitation.

The general rule is thus stated in 12 Cyc., 256:

> Where the offense is continuous, the statute of limitations does not apply where some portion of the crime is within the period, although another portion thereof is not. Thus a prosecution for obstructing a public road may be begun after the statutory period has elapsed, subsequent to the erection of the obstruction, if it still exists within the period of limitations prior to the indictment. The rule also applies to bigamous cohabitation, and according to some of the cases, to conspiracy where it continues.

And thus in Wharton's Crim. Plead. & Prac. (9 Ed.):

> SEC. 321. *Continuous* offenses (such as nuisances, the carrying of concealed weapons, use of false weights, etc) endure after the period of concoction, and as long as the offense by the defendant's action or permission continues to exist. With instantaneous crimes, therefore, the statute begins with the consummation (*Vollendung*); with continuous crimes, it begins with the ceasing of the criminal act or neglect.
>
> SEC. 474. The mere passage of time does not by itself break up into parts an offense otherwise continuous. *If the transaction is set on foot by a single impulse, and operated by an intermittent force, it forms a continuous act, no matter how long a time it may occupy.*

The maintenance of a nuisance is a continuing offense, and prosecution is barred therefor only by

the expiration of the period fixed by statute, after its abatement.

State v. Long, 94 N. Car., 896, 901.
State v. Gilbert, 73 Mo., 20, 21.
State v. Dry Fork R. R. Co., 50 W. Va., 235, 238.
Nashville & Decatur R. R. Co. v. State, 1 Box. 55.

Where it is the duty of one to perform a certain act, as to remove a nuisance, his neglect of such duty may be an offense, and of course a continuing one until the required act is performed.

In 1 Bishop New Crim. Law, sec. 435, it is said:

> There are circumstances wherein men are indictable for what the law calls neglect. It is in the legal sense an act, a departure from the order of things established by law, a checking of action. It is like a man's standing still, while the company to which he is attached moves along, when we say, he leaves the company. On this principle * * *
>
> One under legal obligation to remove a nuisance is indictable when he suffers it to continue.

Also in 2 Id., sec. 1286:

> In one case the court fined the defendant for the non-repair of a bridge, then, learning that it was still out of repair, imposed an additional fine in the same proceeding. But this was held to be unauthorized. It might have delayed sentence, and if the proper repairs

> were not in due time made, imposed a heavy penalty. Or— * * *
>
> A fresh indictment might have been maintained for the continuance of the neglect to repair. And in a larger sense, indictments are sustainable for continuing obstructions in a public way.

The carrying of a concealed weapon is likewise a continuing offense. In *Smith* v. *State* (79 Ala., 257) it was held that:

> Carrying a weapon concealed about the person is necessarily an act continuous in its nature; and where it appears that the defendant while visiting a neighboring plantation and inviting the residents to a dance, exhibited a pistol at two houses some fifty or sixty yards apart, and has been tried and convicted (or acquitted) on the testimony of the persons at one of the houses, he cannot be again prosecuted on the testimony of the persons who saw him at the other house.

The stealing of different articles, though at different times, if but one series of transactions, constitutes but one offense. Thus, in 1 Bishop New Crim. Law, sec. 889, it is said:

> Though the articles are not taken and carried away together, yet if the taking is one continuous transaction, the larceny is one. It is otherwise of disconnected takings, constituting different transactions. Thus—
>
> * * * * *
>
> Where the thief, after carrying away an article, came back in about two minutes for a

> second, and in half an hour for a third, and the indictment was for stealing the three, Littledale, J., ruled that the first two might be regarded as one transaction, but that the larceny of the third was a separate offense—the period of half an hour being too long an interval to consider the act as continuing. Still, plainly, such a question is not to be determined by the number of minutes or hours intervening, but by the nature of the transaction and the special facts. Where one was indicted for stealing coal by working for a series of years, through innocent agents, a mine which extended into the lands of many different proprietors, Erle, J., intimated that this was but one transaction, though he did not absolutely so direct, and said: "I should say that as long as coal was gotten from one shaft, it was one continuous taking, though the working was carried on by means of different levels and cuttings, and into the lands of different people."

Queen v. *Firth* (1 Law Rep. Crown Cases Reserved, pp. 172, 176) was a prosecution for stealing gas, and it appeared that the defendant had connected a gas pipe with a main outside the building and had for years continuously drawn gas therefrom, which he used for fuel in a factory. It was insisted that it did not constitute one offense, but it was held to the contrary, and upon this question Chief Justice Bovill said:

> This view would dispose of the case, if there were no taking except when the gas was burnt; but really this difficulty does not arise

here, because the opening from the main to the pipe was never closed, and the taking was, therefore, in fact continuous. This being so, there is no difficulty in the case; but even if it had not been so, the taking would have been continuous. Many instances might be given besides those already mentioned. Take the case of a granary at a railway station, and a man bringing two wagons close to the granary, and taking sacks from time to time, and extending this taking over four or five days. Here there would be different takings at different times, but it would be impossible to treat the taking otherwise than as one continuous act. Another case might be suggested, of a man at work in a house, stealing, on different days, out of different rooms, and taking one article out of one room, and another out of another, at intervals of a quarter of an hour, or an hour, or longer, all during the same job of work. I should rather suppose that this would be one continuous act, and might be included in one indictment.

This case was subsequently reviewed at the Quarter Sessions (11 Cox's Crim. Law Cases, 234), and the court, after discussing the question fully and citing a number of authorities in support of the position previously taken, affirmed the former holding. The facts in one case cited were that the prisoner had extended the workings of his mine and had thus obtained large quantities of coal from forty different persons; his counsel objected that it was not competent for the prosecution to proceed under the indict-

ment for felonies so distinct, but the court held that it was one continuous transaction and constituted in fact but one larceny, though as a matter of convenience the court restricted the case to the stealing of coal under a churchyard.

By section 3 of the act of March 22, 1882 (ch. 47, 22 Stat., 31), it was provided:

> That if any male person, in a territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court.

In *In re Snow* (120 U. S., 274) it was held that this act created a continuing offense and not one consisting of an isolated act.

Section 1 of the act of February 19, 1903 (ch. 708, 32 Stat., 847), known as the Elkins Act, among other things provided:

> It shall be unlawful for any person, persons or corporation to offer, grant or give or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the

> tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concessions, or discriminations shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars.

It was also provided that a violation of said section might be prosecuted "within the district in which such violation was committed, or through which the transportation may have been conducted." In *Armour Packing Co.* v. *United States* (209 U. S., 56, 73, 76, 77) it was held that the transportation was of the essence of the offense, and that the offense is a continuing one, the court saying:

> The charge is of a single, continuous carriage from Kansas City to New York at a concession from the legal rate for the part of the carriage between the Mississippi River and New York of 12 cents for each 100 pounds so transported. This is a single, continuing offense, not a series of offenses, although it is continuously committed in each district through which the transportation is received at the prohibited rate.

And it was therefore held that the provision with reference to jurisdiction was not violative of article 3, section 2, and the sixth amendment of the Constitu-

tion, which provides that the accused shall have the right to be tried by an impartial jury of the State and district wherein the crime shall have been committed.

Much reliance is had, and the court below based its decision largely upon the case of *United States* v. *Irvine* (98 U. S., 450), wherein it was held that the retention by a pension attorney of moneys which he was required by statute to turn over to the pensioner, was not a continuing offense, but that it was completed when demand was made. The court, in considering this question, said:

> It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when perhaps the pensioner is dead; but the fact of his receipt of the money is matter of record in the pension office.

The indictment in that case was brought under section 13, act of July 14, 1864, chapter 247 (13 Stat., 389), which reads as follows:

> That any agent or attorney who shall, directly or indirectly, demand or receive any greater compensation for his services under this act than is prescribed in the preceding section of this act, or who shall contract, or agree to prosecute, any claim for a pension, bounty, or other allowance, under this act, on the condition that he shall receive a per centum upon any portion of the amount of such claim, or who shall wrongfully withhold

> from a pensioner or other claimant the whole or any part of the pension or claim allowed and due to such pensioner or claimant, shall be deemed guilty of a high misdemeanor. * * *

It is clear from the language of this statute that it was intended by Congress that each of the offenses created should be completed by a single act; and it should not be regarded as controlling or be given much weight where the reason there assigned for the construction does not exist and where the statute under construction clearly shows a contrary intent.

If the offenses here under consideration are continuing ones, they are properly charged in the several counts of the indictment as having been committed on December 30, 1903, "and continuously and at all times during said period of six years, to wit, from that day until and on the day of the finding and presentation of the indictment."

In Wharton's Crim. Plead. & Prac. (9th ed.), section 125, it is said:

> In cases in which it is necessary that a *continuando* should be averred (e. g., in cases of continuous bigamy, or continuous nuisance) the periods between which the offense is charged to continue should be specified. In such cases it is enough to say that the offense was committed on a day named, and on certain other days between two days named, or (when the statute requires) that the offense continued between two named days.

The present indictment is in this respect precisely like the one before the court in *In re Snow* (120 U. S., 281).

With these general principles as to the nature of a continuing offense before us, let us consider specifically the offenses charged in the indictment in this case.

III.

First, Fifth, and Ninth Counts.

The first, fifth, and ninth counts of the indictment contain the same allegations and differ only in this: That the first count is for engaging in a conspiracy in restraint of trade and commerce in *refined sugar* among the several States of the United States; the fifth count is for engaging in a conspiracy in restraint of commerce in the purchase and sale of *raw sugar and molasses* among the several States of the United States, while the ninth count is for engaging in a conspiracy in restraint of trade and commerce *with foreign nations* in the purchase and shipment of raw sugar and molasses.

The substance of the first count is as follows:

The American Sugar Refining Company, the corporation defendant, was, and had been for six years next before the finding of the indictment, a corporation organized under the laws of the State of New Jersey, and defendants Thomas, Donner, Senff, Mayer, Frazier, and Parsons had been directors thereof and had controlled and managed its affairs; and Parsons was also its general counsel and Donner

was its treasurer. That said company had for said period of time been engaged in the manufacture of refined sugar and shipping the same into all the States of the United States, and was and had been engaged in commerce among the several States with respect thereto, within the meaning of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and had controlled 90 per cent of the trade therein; that throughout said period of six years the Pennsylvania Sugar Refining Company had been a corporation, organized and existing under the laws of Pennsylvania, and organized for the purpose of competing with the American Sugar Refining Company in the same business; that the Pennsylvania company, on the 30th day of December, 1903, by the expenditure of $2,000,000, possessed an extensive sugar manufacturing plant in Philadelphia, and was provided with the necessary facilities for refining sugar, and was about and intended to engage in said business in accordance with the purpose of its organization; and "throughout the remainder of said period would so have carried on said business, trade, and commerce if it had not been for the unlawful and corrupt conduct of said corporation defendant, of its said directors, and of certain other individual defendants hereinafter named, which is now to be described." (Rec., p. 4.) It is then alleged that the several defendants—

> On said thirtieth day of December, in the year nineteen hundred and three, and continuously and at all times during said period

> of six years, to wit, from that day until and on the day of the finding and presentation of this indictment, each then well knowing all the premises in this indictment aforesaid, in violation of the provisions of section one of said act of Congress, *have engaged* in an unlawful and corrupt conspiracy among themselves in restraint of said trade and commerce in refined sugar among the several States of the United States; that is to say, a conspiracy unreasonably to restrain and eliminate free competition, and prevent all competition, with said corporation defendant, in such trade and commerce, by said Pennsylvania Sugar Refining Company, to the very great injury and detriment, financial and moral, of the people of the United States, and this by and through the unfair, deceitful, unlawful and corrupt means and practices on the part of said corporation and individual defendants which are now here described. (Rec., p. 5.)

The nature and character of the conspiracy is thus described:

1. One Adolph Segal was, on December 30, 1903, the treasurer, and held a majority of the capital stock of the Champion Construction Company, a corporation, and said Champion Construction Company was the owner and holder of 26,000 out of a total of 50,000 of the shares of the capital stock of the Pennsylvania Sugar Refining Company, said Segal holding thereby a controlling interest in the stock of the Pennsylvania company. Defendants, knowing of said fact, conspired to secure from the Champion Construction

Company, through Segal, for the American company, the possession of and the authority to vote the shares of stock in the Pennsylvania company, for at least the term of one year, which was to be accomplished by inducing Segal to borrow, for the term of one year from January 4, 1904, from defendant Kissel, acting as a broker and agent for a lender whose identity was not to be revealed to said Segal, but which lender was in fact to be the defendant American company, the sum of $1,250,000, at 6 per cent, for use in his business as promoter of hotel and other enterprises, said Segal to transfer to Kissel, as further security, full power to vote the 26,000 shares of stock of the Pennsylvania company, without Segal being aware of the fact that the American company would be the real lender of the money, and without his suspecting such designs or having reason to suppose that the lender would have any other desire than to obtain interest on his loan, or any motive for preventing the Pennsylvania company from carrying on its business, and paying dividends in such way as to enable Segal to pay the interest on and the principal of the sum to be borrowed, said Segal being dependent upon such dividends for moneys to pay such interest and principal, which fact defendants knew, and further knew that his financial affairs would be placed in a ruinous condition unless such dividends were paid.

2. When the control of the Pennsylvania company was thus acquired, defendants were to use every means in their power to extend the time of control, by keeping Segal involved in debt, and his affairs in

such condition as to prevent his repaying the debt, and by arbitrarily refusing to accept payment thereof, either before or at its maturity, or to surrender to him the power of control over the Pennsylvania company.

3. When such power of control should be acquired by defendants they were to use the same to prevent the Pennsylvania company from engaging in, in whole or in part, the business, trade, and commerce, for the carrying on of which it was organized, and were thereby to bring about the ruin of the Pennsylvania company by inaction and the destruction of its property and facilities through decay, and thus entirely prevent competition with the American company, which would "but for the act of said corporation and individual defendants in the premises come into existence through the operation of said Pennsylvania Sugar Refining Company."

In pursuance of this conspiracy, it is then alleged that the following acts were committed:

First. On December 30, 1903, defendant Kissel executed and had Adolph Segal execute a written agreement, which is copied into the indictment, and which consisted of a copy of a note to be executed by Segal for $1,250,000 and an assignment by him to secure this loan, the 26,000 shares of the capital stock of the Pennsylvania company, and other assets, and among other provisions, contained the following:

> The borrower agrees that he will so arrange that the absolute voting power for the said twenty-six thousand (26,000) shares of the

stock of the Pennsylvania Sugar Refining Company shall be in the lenders; that the lenders shall have the right to use such voting power as may be suitable to aid or effectuate the purposes hereof; and as the control thereby given is a material part of the consideration for the said note, the borrower further agrees that he will so arrange that, of the seven directors of the said Pennsylvania Sugar Refining Company, four to be nominated by the lenders, of whom one shall be the said Gustav E. Kissel, shall be put in place of four of the present directors, that they, or substitutes to be nominated by the lenders, shall be directors so long as any part of the loan shall remain unpaid; that the control and possession of the property of the said the Pennsylvania Sugar Refining Company shall be in such way and so effectually subjected to the control of the board of directors that so long as the note, or any part thereof, remains unpaid, the refinery of the said the Pennsylvania Sugar Refining Company shall only be run or operated or do business as shall be directed by such board of directors; any expense caused by the possession of the property, or in carrying out this agreement on the part of the lenders, to be added to the said note and to be entitled to the security and to the benefit of all the provisions on the part of the borrower therein contained with like effect as if the same had been specially mentioned therein. (Rec., p. 9.)

Second. On December 30, 1903, defendant Harned signed, as president of the Champion Construction

Company, a consent to the use of the 26,000 shares of capital stock of the Pennsylvania company, as provided for in the instrument executed by Segal and Kissel.

Third. On the same day, the Champion Construction Company, by Harned, its president, executed a power of attorney, authorizing Kissel to vote the 26,000 shares of capital stock of the Pennsylvania company.

Fourth. On the same day Kissel "*did attend a meeting of the board of directors of said Pennsylvania Sugar Refining Company, and as such director did vote in favor of and so secure the adoption of a resolution of said board to the effect that said Pennsylvania Sugar Refining Company should thereafter refrain from carrying on its business until the further order of said board of directors.*"

Fifth. On December 31, 1903, defendant Donner, as treasurer of the American company, signed a check for $250,000, payable to Kissel.

Sixth. On the same day Kissel executed a receipt for said check.

Seventh. On January 4, 1904, the American Sugar Refining Company issued to Kissel three checks, two for $250,000 each, and one for $500,000.

Eighth. On the same day Kissel executed a receipt for said checks.

Ninth. On the same day Kissel signed a statement of the account pertaining to this matter, as it then existed between him and the American company.

Tenth. On the same day Kissel signed his name to a letter addressed to the American company, in which he gave a list of the securities and other documents in his possession relating to this matter, and stating that he had rented a safe in the National Safe Deposit Company, New York, where they were deposited.

Eleventh. On January 5, 1904, the American company, through its president, wrote a letter to Kissel, in which said company stated that it would hold him harmless by reason of the execution of the aforesaid agreement and any action taken thereunder; and further stating that he should look to Segal for compensation.

Twelfth. On May 23, 1905, defendants Donner, Senff, Frazier, and Parsons attended a meeting of the executive committee of the board of directors of the American company.

Thirteenth. On February 13, 1903, defendants Thomas, Donner, Senff, and Mayer attended a meeting of the board of directors of the American company, and voted for and secured the adoption of resolutions that the secretary send the president a letter giving him a copy of the resolutions of the stockholders with reference to the proceedings in the Segal matter, and asking him to cooperate in defending against such proceedings, and agreeing as to him that the company assumed the entire responsibility of what had occurred in the Segal matter, and that it would defend, protect, and indemnify him, and in the event of a suit and possible recovery that it would either pay the same, or, if an appeal be taken, it would

stay proceedings and secure and, if required, make payment; and that a letter be also sent defendant Parsons, the counsel of the company, with a copy of said resolution of the stockholders, and asking him to cooperate in defending against such proceedings, and agreeing that the company assumed the responsibility of what had occurred in the Segal matter, and that it would defend and protect and indemnify him, and in the event of a recovery would pay the same.

Fourteenth. On February 15, 1907, defendant Parsons signed a letter acknowledging receipt of the above-described communication, and stating that he would cooperate in defending any proceedings which might be taken.

Fifteenth. On May 3, 1907, defendant Kissel signed a certain letter in which he transmitted his account of expenses in connection with this matter to the American company.

Sixteenth. On May 10, 1907, the American company settled the account due Kissel, according to the above-mentioned statement.

Seventeenth. On November 12, 1907, defendants Thomas, Donner, Senff, Frazier, Mayer, and Parsons attended a meeting of the directors of the American company.

Eighteenth. On April 19, 1909, defendant Parsons signed a letter addressed to Mr. C. R. Heike, in which he said he would send the advertisement about the Pennsylvania Sugar Refining Company bonds to Mr. Johnson, who had the matter in charge, and that

with the bonds held by Mr. Kissel, he thought that they represented such a holding as to make it undesirable to submit the action to a probably hostile committee, and that if any action were required he would let him know.

The feature of these counts which is especially important, and to which the court's attention is particularly called, is that *the offense charged in each count is not the formation of a conspiracy, but the engaging in the conspiracy described for the purposes alleged*, by the doing of the particular acts described. The overt acts set forth do not bear the same relation to the offenses for which defendants are here indicted, as such acts do to an ordinary conspiracy. They are here alleged as constituting elements of the offense, and not as incidents growing out of the offense of conspiring; that is, it was by and in the commission of these several acts that defendants *engaged in* the conspiracy.

(*a*) *The offenses with which defendants are here charged are continuing ones, and the statute of limitation does not bar a prosecution therefor until the expiration of three years after defendants' participation therein.*

These counts are drawn under the first section of the act of July 2, 1890 (ch. 647, 26 Stat., 209), which reads as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared

> to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

This section is composed of two sentences, the first of which declares what contracts or combinations are illegal, and the second declares the making or engaging in such a contract or combination a misdemeanor. The meaning of the first sentence is perfectly clear. It does not declare merely that it is illegal to *enter into* the contract or combination described, but such contract is declared illegal *during every moment of time from its execution to its abrogation. Both its birth and continued existence are equally prohibited thereby,* and *the continued existence of the illegal act is distinctly recognized.* This fact has a very important bearing upon the construction of the second sentence, which declares it an offense to do either of two things, to either *make* such a contract or to *engage in any such combination or conspiracy.* The doing of the first would undoubtedly constitute a complete offense, as the contract is made when it is executed; but it is just as clear that with reference to the second a series of acts or a continuous condition is contemplated.

As said, the contract or combination is *continuously* illegal; and to *engage* therein clearly refers to a series of acts or a continuous course of conduct

designed to carry out the object of the unlawful combination. If, in compliance with and under such a contract, a manufacturer should fix a certain price upon his goods, and should from day to day maintain and make numerous sales at such price, would it be contended that he could be separately prosecuted for each of such sales? While acts of this kind would be more numerous, yet the same principle must apply to any series of acts designed to perpetuate and enforce the unlawful contract.

The principles of the case above cited, wherein it was held that a taking of gas which was continued for years, and also the mining of coal from different tracts of land through one shaft, which had been continued for several years, constituted but one larceny, are here directly applicable, but with far greater force.

The second meaning of the intransitive verb "engage," as given by Webster, is—

> To embark in a business, to take a part; to employ or involve one's self; to devote attention and effort; to enlist; as to *engage* in a controversy—

and clearly signifies a continuous course of conduct with reference to some particular matter.

But that the offense here charged is a continuing one has been settled by this court in *United States* v. *Trans-Missouri Freight Association* (166 U. S., 290; *Northern Securities Co.* v. *United States* (193 U. S., 197), and *Loewe* v. *Lawlor* (208 U. S., 274). These

cases are referred to at greater length in pages 53 and 54 of the Government's original brief.

It is insisted, however, that inasmuch as these were civil cases, brought under section 4 of said act, they have no binding force in a criminal case, and that the court should adopt a different view in enforcing the penal provisions of the statute. The error of this contention is apparent from a reading of said section 4, which authorizes civil proceedings and which provides that "the several circuit courts of the United States are hereby vested with jurisdiction to prevent and restrain *violations of this act.*" That is, it is the *violations* denounced in sections 1 and 2 of the act which the courts are authorized to restrain, and in determining whether or not the injunctive power of the court should be exercised it was necessary for the court to first determine whether or not a violation existed. The case of *United States* v. *Trans-Missouri Freight Association* and *Northern Securities Co.* v. *United States*, above cited, were both predicated upon this section, and the decrees therein were pronounced upon the theory that the parties to the contracts there in question were engaging in an unlawful combination or conspiracy. In fact, it is difficult to conceive how an unlawful contract or combination of this character can remain in force, and the parties thereto be not at the same time *engaging in* such combination.

Furthermore, the construction of a statute in a civil proceeding is authority for a like construction

in a criminal prosecution. A similar contention to the one here advanced was made in the case of *United States* v. *Keitel* (211 U. S., 370, 392), but it was there said that "because the statute was thus construed in a civil case affords no reason for saying that the authoritative construction is not to be applied in a criminal case," and the same was therefore held applicable to both civil and criminal proceedings.

Furthermore, in *United States* v. *McAndrews and Forbes Co.* (149 Fed., 823, 830) Judge Hough applied in a criminal case a like construction as that given by this court in the cases above cited.

(*b*) *The facts which appear in the pleadings show that the defendants engaged in the unlawful contract or combination within three years before the finding of the indictment.*

No overt act is alleged to have been committed by defendant Harned after he signed the power of attorney authorizing Kissel to vote the 26,000 shares of stock of the Pennsylvania Company on December 30, 1903.

As to defendant Kissel, it appears that on May 3, 1907, he sent a statement of his account to the American Sugar Refining Company (Rec., p. 17), and in that account it is shown that on December 8, 1906, he paid $50 rent for the vault in the National Safe Deposit Company, in New York. In his letter to the same company of January 4, 1904, he stated that as the 1,500 bonds which had been transferred to him

by Segal as part security for the $1,250,000 loan, were voluminous, he had rented safe No. 2588 in the National Safe Deposit Company. It is thus shown that Kissel retained those securities, a list of which was given in his letter addressed to the American Sugar Refining Company of January 4, 1904, in his possession and under his control up to the latter part of 1906. Furthermore, during the early part of that year his statement of account shows that he had paid the expenses of a trip to Philadelphia of one Robinson, to demand payment of $3,000 of Majestic bond coupons, which were a part of the collateral assigned to him by Segal, and had paid $250 to Cravath, Henderson & DeGersdorff for legal services in connection with the loan, had paid to Mr. John G. Johnson $100 as a retainer, and had likewise paid a retainer of $1,000 to Mr. Howard Taylor. Kissel was, therefore, active in this matter, and held the collateral placed in his possession to secure the loan, during the year 1906.

Furthermore, it appears from the allegations of the fourth paragraph of defendant Kissel's plea (Rec., p. 33), that at the instance of one Babcock a receiver was appointed for the Pennsylvania Sugar Refining Company by the Court of Common Pleas No. 4 for the county of Philadelphia, on October 2, 1906, and that the officers and agents of said concern were then enjoined from in any way meddling with, or in any way disposing of, its assets and property; and it appears, therefore, from the allegations of the indictment, supplemented by this paragraph of said defendant's plea, that the Pennsylvania company remained

under the dominion and control of the American company through the directors selected under the contract entered into between Segal and Kissel continuously from December 30, 1903, up to October 2, 1906. The indictment was returned on July 1, 1909 (Rec., p. 31), or less than three years after the Pennsylvania company was, by said receivership, removed from the control of the American company.

The prosecution against defendants is therefore not barred, because—

(1) The continued existence of the Pennsylvania company under the control of the American company, through and by virtue of the contract between Segal and Kissel, and its being thereby continually prevented from competing with the American company, constituted a continuous engaging in the unlawful contract, combination or conspiracy described; and, in consequence of said continual violation of the statute in question, defendants were subject to prosecution at any time within three years after such condition ceased, on October 2, 1906.

The effect of the continuation of this condition by virtue of the order of the board of directors will be hereinafter more fully considered.

(2) These counts of the indictment describe a conspiracy, and although the offense here declared consists in *engaging in* such conspiracy, yet the conspiracy is a material part thereof; and, inasmuch as defendants were coconspirators and joined in the agreement whereby it was contemplated that a certain course of action should be taken whereby the

Pennsylvania company should be permanently and continuously removed from competition with the American company, they thereby constituted each and every one of their coconspirators their agents in bringing about and perpetuating such condition, and they were therefore chargeable with the overt acts of all their coconspirators, and were subject to prosecution at any time within three years after the commission of any act in furtherance of the conspiracy by either of the conspirators. In other words, when one of the parties who entered into the unlawful combination engaged therein by the commission of any act it was the act of all the conspirators, and each and every one was thereby chargeable with engaging in the conspiracy.

IV.

Second, sixth, and tenth counts.

The second count alleges that the defendants

> In and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy, in said first count set forth, unlawfully have knowingly and corruptly monopolized a part of the trade and commerce among the several States, to wit, the interstate trade and commerce in refined sugar. (Rec., p. 19.)

The sixth and tenth counts are the same in language as the second, except that the sixth relates to interstate commerce in raw sugar and molasses and the tenth relates to commerce with foreign nations in raw sugar and molasses.

These counts, therefore, do not charge a conspiracy in any form, *but charge an offense which is entirely distinct in its characteristics from a conspiracy*, the substance of the allegations being that, by means of the conspiracy alleged, and by the holding of the majority of the stock of the Pennsylvania company by the Champion Construction Company and the assignment of said stock to Kissel, and the making of the loan to Segal without revealing to him by whom the loan was made, as alleged, and by thus obtaining control of the Pennsylvania company, secretly and fraudulently, in the manner described, and by immediately upon procuring a majority of the directors of the Pennsylvania company, having passed a resolution to shut down the factory of that company and put it entirely out of business, and by the various acts done by and in consequence of the meetings of the board of directors of the American company set forth in the first count, and by that company assuming all responsibility for the Segal matter and employing counsel to defend any suits that might be brought in consequence thereof, and by each and every one of the other acts set forth in said first count, *defendants, during the entire six years preceding the finding of the indictment, monopolized*

the trade and commerce among the States in refined sugar.

The offense here charged is a continuing one, and he who commits the same was subject to prosecution at any time within three years after such monopoly ceased; and as these counts expressly allege that the monopoly continued during the entire time of six years prior to the date of the finding of the indictment, this offense was not barred by the statute.

These counts are drawn under the second section of the Sherman Act, which reads as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The offense of monopolizing, as here denounced by Congress, is beyond all doubt a continuing offense. There can be no conception of a monopoly which does not extend over a continuing period of time. Nor can it be conceived that one can monopolize any definite line of trade for an infinitesimal length of time. When one monopolizes a trade, he obtains and *continues* in the exclusive control of such trade; and it would be absurd to suppose that Congress

intended to denounce as a criminal act the *obtaining* of exclusive control of a line of trade, when such act within itself would inflict no injury upon the public, and at the same time did not denounce as an offense the *continuation* of such control, when it is by the continuation alone that the evil effect upon commerce is produced. No better illustration can be given than the results which are alleged in the indictment to have been contemplated by the American Sugar Refining Company. Suppose, as is alleged, this company, by obtaining complete control of the Pennsylvania company in the manner alleged, acquired an entire monopoly of the sugar-refining business in the United States, and by the American company's still holding the control of the Pennsylvania company by virtue of the four directors who were elected at the instance of the American company, and who were subservient to its wishes, and by the order of such directors made December 30, 1903, remaining unrevoked, the Pennsylvania company was continuously kept out of business, and thereby the monopoly was continued in favor of the American company. Could it be doubted that at every moment such condition existed the American company was *monopolizing* the sugar business, just as much as it was the moment it first, by the method declared, shut down the operation of the Philadelphia refinery?

No case heretofore cited under "Nature of continuing offenses" presented facts which more clearly constituted a continuing offense than the one here

created by this statute. The condition here presented is even stronger than the principle announced in Wharton's Crim. Plead. & Prac., sec. 474, that—

> If the transaction is set on foot by a single impulse and operated by an intermittent force, it forms a continuous act no matter how long a time it may occupy.

Here the monopoly was set on foot by a single impulse—that is, by the passage and enforcement of the order adopted by the board of directors, directing that the Pennsylvania company cease operation; but this transaction, or continuing condition, was not the result of an *intermittent force*, but was perpetuated by virtue of the order remaining unrepealed—[redacted] the continued application of the very force which in the beginning brought about the monopoly.

It is as clearly a continuing offense as the maintenance of a nuisance, or the mere failure to perform a duty, as the removal of a nuisance or the repair of a bridge, or the carrying of a concealed weapon; and there is much greater reason in declaring it a continuing offense than there was in holding that making connection with a gas pipe and taking gas therefrom for years in succession, or removing coal from a mine from different tracts of land extending through several years, constituted continuing offenses. Furthermore, this act, in declaring it an offense to monopolize any part of a trade or commerce, more clearly contemplated a continuing offense than it was contemplated by the Elkins Act in declaring that every person or corporation who should offer, grant or give,

or solicit, accept or receive any rebates, concessions, or discriminations, should be deemed guilty of a misdemeanor, that such offenses should be continuing ones during the entire period of transportation of the articles for the shipment of which such rebates were made.

Therefore, the prosecution for these offenses was not barred as against either Harned or Kissel. Harned, on behalf of the Champion Construction Company, agreed for the stock of the Pennsylvania company to be used as provided for in the contract between Kissel and Segal, and also executed the power of attorney which enabled Kissel to first vote this stock. Kissel procured the election of the four directors who were subservient to the American company, of whom he was one, and participated in voting the order of the board which shut down the Pennsylvania factory, and put and held the company out of competition with the American company. These acts of both Harned and Kissel were done in pursuance of the unlawful agreement, and with the intent to create the monopoly alleged, *and were the very acts which immediately and directly accomplished the object of the conspiracy. They are, therefore, the very defendants who were responsible for putting this continuing force in motion, and must be liable for its effects as long as it was exerted.*

When one intentionally puts in motion an unlawful force, he is liable for all consequences resulting directly therefrom, regardless of the length of time

such force may continue to operate. This principle is thus expressed in 1 Bish. New Crim. Law, sec. 641:

> One is responsible for what of wrong flows directly from his corrupt intentions; but not, though intending wrong, for the product of another's independent act. If he set in motion the physical power of another, he is liable for its result. If he contemplated the result, he is answerable though it is produced in a manner he did not contemplate. If he did not intend it in kind, yet if it was the ordinary effect of the cause, he is responsible. If he awoke into action an indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible.

Furthermore, when they entered into the conspiracy with the other defendants, to bring about and perpetuate this monopoly, by the unlawful and fraudulent means described, they thereupon constituted all the other co-conspirators as their agents, and are bound by and responsible for all acts performed by them.

These offenses are properly charged in these counts. As stated in Wharton's Crim. Plead. & Prac., *supra*, the offense being a continuing one, it is proper that a *continuando* should be averred; and it is expressly averred in these several counts that this monopoly continued during the entire six years previous to the finding of the indictment.

The manner by which the monopoly was produced is also particularly charged by declaring that it was the result of the conspiracy and the many acts of the conspirators alleged in the first count, and it was unnecessary to describe particularly in what manner the conspiracy and each particular act contributed to a perpetuation of the monopoly. It was sufficient to allege the facts with such certainty as would place the defendant upon notice, and to charge in unmistakable terms the offense which was thereby committed.

In *United States* v. *Corbett* (215 U. S., 233), wherein defendant, as a bank official, was indicted for making false entries in a report to the comptroller, the entries showed that the condition of the bank was better than it really was. The court below held that the intent to defraud the bank could not be inferred from the making of such entries, but this court held that it did not follow as a matter of law that the fraudulent intent alleged in the indictment could not be entertained in making false entries in a report to the comptroller showing the bank in a better condition than it really was, that being a question which should be determined from all the facts presented on the hearing.

So in the present case, it is unnecessary to assign reasons why the conspiracy and each of the various acts alleged aided and altogether brought about and perpetuated the monopoly, that being a matter for the consideration of the jury upon the trial of the case.

V.

Third, seventh, and eleventh counts.

These counts differ from the second, sixth, and tenth counts only in that instead of charging that defendants actually monopolized the commerce mentioned, they charge that they *attempted* to monopolize such commerce.

These counts were also drawn under the second section of the Sherman Act, and likewise charge a continuing offense. Each of the overt acts alleged was one of a series of acts the object of which was to monopolize commerce; moreover, the conspiracy itself was an *attempt* to create a monopoly, and, as above argued, the continuation of the status of the Pennsylvania company as brought about by the acquiring of control of said company by the American company, and by the enforcement of the resolution of the board of directors, not only monopolized a part of the trade and commerce described, but constituted a continuous attempt at monopolizing such trade and commerce.

VI.

Fourth, eighth, and twelfth counts.

The fourth count alleges that the defendants—

> In and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned,

> and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy, in said first count set forth, unlawfully have each knowingly and corruptly conspired with the others to monopolize a part of the trade and commerce among the several States, to wit, the interstate trade and commerce in refined sugar. (Rec., p. 19.)

The eighth and twelfth counts are the same in language as the fourth count, except that the eighth relates to a conspiracy to monopolize commerce among the States in raw sugar and molasses, and the twelfth relates to a conspiracy to monopolize commerce with foreign nations in raw sugar and molasses.

These counts are also based upon the second section of the Sherman Act, and are distinctly *conspiracy* counts.

This act, which makes it an offense to conspire "with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations," differs from section 5440, Revised Statutes, in that it does not require the commission of an overt act as a prerequisite to a prosecution; and it was, therefore, unnecessary that any overt act be alleged in the indictment, it only being required that the nature and scope of the conspiracy, and the method by which it was to be carried into effect, be described with reasonable certainty.

It may be regarded as a rule universally recognized by the authorities, that where the act itself does not require that an overt act be committed before the offender can be prosecuted, it is unnecessary to set forth in the indictment any overt act; and that in case such acts are alleged, it is equally unnecessary that they be proved, and that they may be treated as mere surplusage. (Archbold's Crim. Plead. Evid. & Prac., 1215; 2 Bishop New Crim. Proced. (4 Ed.), sec. 205; *State* v. *Straw*, 42 N. Hamp., 393, 394; *Commonwealth* v. *Judd*, 2 Mass., 329, 336; *Commonwealth* v. *Shedd*, 61 Cush., 514, 516; *Commonwealth* v. *Fuller*, 132 Mass., 563, 566, 567; *People* v. *Richards*, 1 Mich., 216, 224; *People* v. *Dyer*, 79 Mich., 480, 481; *State* v. *Keach*, 40 Vt., 118.)

It necessarily follows as a corollary of this principle that the essential allegations of the indictment may be supported by proof of overt acts entirely independent of and different from those which are particularly set forth in the indictment, and, consequently, that in making out the offense charged in the present indictment against Kissel and Harned, the Government can not be confined to proof of the particular facts alleged as overt acts, but may prove any specific acts in addition thereto or independent thereof, and also any course of conduct upon the part of defendants, or by any or either of their coconspirators, which would tend to show guilt, and would further tend to prove an existence of the offense within three years before the finding of this indict-

ment. As held in the case of *United States* v. *Cook* (*supra*), time is not a material element of the offense, and the Government can prove upon the trial either that the specific acts alleged occurred at other times than those declared in the indictment, or, as stated, may show independent acts which were committed at other times and which would show a continuance of the offense.

The question whether an ordinary conspiracy is a continuing offense or a completed one, when the combination is formed, the one view of which is so ably discussed in the late Solicitor-General's brief, and the other in the brief filed by counsel for defendants, will not be here considered, nor is it deemed of vital importance which view is taken by the court.

It is conceded in the brief filed by counsel for defendants that although the offense of conspiracy is committed by the hatching of the plot, yet the commission of an overt act by the conspirators renews the same; and while it is suggested therein that the overt act renews the conspiracy only as to those who participate in its commission, yet it is finally admitted (on p. 83) that the offense "is subject to renewal and that the renewal may be evidenced by the conscious participation of any of the conspirators in acts done for the purpose of effecting the object of the original conspiracy."

It is well established by the decisions of this court that the act of one conspirator is the act of them all.

The court, speaking through Mr. Justice Story, in *United States* v. *Gooding* (12 Wheat., 469), said:

> In cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. Each is deemed to consent to or command what is done by any other in furtherance of the common object.

See also *Lincoln* v. *Claflin* (7 Wall., 132, 138); *Bannon and Mulkey* v. *United States* (156 U. S., 464, 469).

The nature and effect that might probably result from the various overt acts alleged in the indictment are considered on pages 56 to 66 of the brief heretofore filed on behalf of the Government, and will not be here discussed. But this additional observation will be made, that, *when the conspiracy contemplates the bringing about of a permanent condition, which condition will perpetuate a monopoly, a continuation of such a condition is a continuation of the conspiracy, because such condition must be considered as a continuing overt act;* as for illustration, suppose the defendants conspired, as alleged in the indictment, to obtain control of the Pennsylvania company and thereby put it out of business and thus secure a monopoly of the sugar refining business; and in furtherance of this conspiracy obtained control of the Pennsylvania company by having elected a majority of the board of

directors who were favorable to the American company, and in obedience to its behest such directors closed down the Pennsylvania plant and thereby kept it entirely out of business. It can not be doubted that not only would the act in procuring the election of the majority of the board of directors, and the further act on the part of such directors in closing the Pennsylvania company, be overt acts performed in furtherance of the conspiracy, and therefore renewing its existence at such times, *but that the continuation of that condition would of itself be a continuous overt act, which would keep the conspiracy alive for the entire period during which such condition existed.* This is true because the resolution adopted by the board of directors was a continuing force, and the influence and effect of such force was just as much felt and just as effective every moment it remained unrepealed as it was the moment it went into effect. And it was this continuing force which was from day to day, and every moment of time, exerted, that perpetuated the monopoly and kept the Pennsylvania company out of competition with the American company.

Counsel cite a Pennsylvania statute (P. L. March 5, 1903, No. 17), which provides that:

> Stockholders of all corporations of this Commonwealth, wherever residing, who shall be entitled to vote at any corporate meeting or election thereof, shall have and be possessed of the right and power to vote thereat by

> proxy duly executed by the stockholder, either with or without notarial or other acknowledgment, but properly attested by the signature of a witness, and that one person may be constituted and act as proxy for any number of stockholders: Provided, however, that proxies dated more than two months prior to any such meeting or election shall not confer right to vote thereat,

to show that the proxy given Kissel by the Champion Construction Company became invalid two months after it was executed, and that the control of the Pennsylvania company could then have been recovered by the Champion Construction Company. However, this proxy was of no avail except in stockholders, meetings, and the board of directors had already been elected, and had assumed control of the affairs of the company and continued in charge thereof; and, furthermore, the contract which was fraudulently procured by Kissel from Segal, who had control of the Champion Company, expressly provided that the control of the Pennsylvania company should remain in the hands of the board of directors, the majority of whom were to be nominated by the American company, *and this very stock had been assigned to Kissel, and was under his dominion and control, and he had the right and power to vote the same without a proxy.* (See contract on pp. 7 and 9 and list of securities on p. 14.)

VII.

Thirteenth and Fourteenth Counts.

The thirteenth count alleges that defendants, by the conspiracies and acts alleged, engaged in a conspiracy in restraint of commerce among the several States and with foreign nations in the purchase and shipment of materials, to wit, raw sugar and molasses, for the manufacture of refined sugar, and in the interstate commerce of refined sugar manufactured from such materials; and the fourteenth count alleges that by the same means, defendants monopolized and attempted to monopolize a part of the trade and commerce among the several States and with foreign nations in the purchase and shipment of raw sugar and molasses for the manufacture of refined sugar and interstate commerce in refined sugar manufactured from such materials.

The nature of the offenses in these counts are the same as those heretofore considered, and the reasons heretofore given in favor of the sufficiency of the other counts apply equally to these counts.

The judgment of the lower court should therefore be reversed and the case remanded for trial.

JAS. A. FOWLER,
Assistant Attorney-General.

NOVEMBER, 1910.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 390.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GUSTAV E. KISSEL AND THOMAS B. HARNED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR KISSEL.

WASHINGTON, NOVEMBER 3, 1910.

JOSEPH H. CHOATE,
WILLIAM D. GUTHRIE,
HOWARD S. GANS,
WILLIAM C. OSBORN,
Of counsel for defendant Kissel.

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STATEMENT.

This is a criminal prosecution instituted under the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (c. 647, 26 Stat. 209), commonly known as the Sherman Anti-Trust Act. An indictment was found and filed on July 1, 1909, against The American Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Gustav E. Kissel and Thomas B. Harned. It contains fourteen counts framed under sections 1 and 2 of the act, charging the defendants with engaging in conspiracies in restraint of interstate and foreign trade and commerce, and monopolizing, attempting to monopolize and conspiring to monopolize such

trade and commerce. The defendants Kissel and Harned separately interposed special pleas in bar averring that the alleged offenses charged against them were barred by the provisions of section 1044 of the Revised Statutes in that the indictment had not been found within three years next after the offenses charged therein or any of them had been committed (rec. pp. 32, 52).

The fourteen separate counts are all based upon the same acts and the same transaction. Four of the counts (1, 5, 9 and 13) charge the defendants with engaging in a conspiracy in restraint of interstate or foreign trade and commerce in violation of section 1 of the Sherman Act, whilst the remaining counts (2, 3, 4, 6, 7, 8, 10, 11, 12 and 14) charge them with monopolizing, attempting to monopolize and conspiring to monopolize trade and commerce in violation of section 2 of the act. Further analyzed, the various counts charge seven different forms of conspiracy (1, 4, 5, 8, 9, 12, 13), and seven different forms of monopolizing or attempting to monopolize (2, 3, 6, 7, 10, 11, 14), all of which are based upon different aspects of the same alleged conspiracy and overt acts. The averments of the first count alleging conspiracy in restraint of interstate trade and commerce in refined sugar are either embodied by reference as in counts 2, 3, 4, 6, 7, 8, 10, 11, 12, 13 and 14, or repeated as in counts 5 and 9, and in none of the subsequent counts are any facts alleged which are not alleged in the first count.

The first count alleges that The American Sugar Refining Company for upwards of six years prior to the finding of the indictment was a corporation of the State of New Jersey, carrying on the business of manufacturing refined

sugar from raw materials at its manufacturing plant in New Jersey and of selling and shipping the same to dealers and consumers in all the States, and as such engaged in trade and commerce among the several States, and had and controlled ninety per cent. of such interstate business; that the individual defendants, Thomas, Donner, Senff, Mayer, Frazier and Parsons were directors of such corporation, and controlled and managed its affairs, the said Parsons being its General Counsel and the said Donner its Treasurer; that the Pennsylvania Sugar Refining Company was a corporation of the State of Pennsylvania organized for the purpose of carrying on the same business in competition with the American Company, and that on the thirtieth of December, 1903, it had acquired grounds for and erected a sugar-manufacturing plant and provided necessary facilities and was prepared to engage and intended to engage in and carry on said business and would have done so if it had not been for the unlawful and corrupt conduct of the defendants. The indictment then proceeds to charge that the defendants "on said thirtieth day of December, in the year nineteen hundred and three, and continuously and at all times during said period of six years, to wit, from that day until and on the day of the finding and presentation of this indictment . . . have engaged in an unlawful and corrupt conspiracy among themselves in restraint of said trade and commerce in refined sugar among the several States of the United States; that is to say, a conspiracy unreasonably to restrain and eliminate free competition, and prevent all competition, with said corporation defendant, in such trade and commerce, by said Pennsylvania

Company," and that this was to be done by certain means and practices which are then described. It is alleged that one Adolph Segal, of Philadelphia, was the owner and holder of a majority of the capital stock of the Champion Construction Company, a corporation which itself was the owner and holder of 26,000 shares out of a total of 50,000 shares of the capital stock of said Pennsylvania Company; that Segal was consequently the virtual owner and holder of a controlling interest in the stock of that company; that the defendants were to get from said Champion Company through Segal the possession, use and control of and the authority to vote said shares and thereby secure the power of control over and management of said Pennsylvania Company "for the term of one year at least," which was to be accomplished by inducing the said Adolph Segal "to borrow, for the term of one year from the fourth day of the then next succeeding month of January" (*i. e.*, January 4th, 1904) from the defendant Kissel acting as a broker and as the agent of a lender whose identity was not to be by him or any of the defendants disclosed to said Segal, but which lender was in fact to be the defendant American Company, the sum of $1,250,000 and to transfer to the said Kissel together with other security for the repayment of said sum of money written authority to exercise the power of voting as holder of said 26,000 shares of stock of the Pennsylvania Company; that when the power of control over and management of the said Pennsylvania Company should be so acquired "for the term of one year in the manner aforesaid," the defendants were to use every means in their

power to extend said term and said power of control by keeping the said Segal involved in debt and his affairs in such a condition as to prevent his relieving himself from his obligations to the defendant corporation and by wrongfully and arbitrarily refusing to accept payment of such obligations from him either before or at their maturity, or to surrender to him such power of control over and management of the said Pennsylvania Company; and that when the power of control over and management of the said Pennsylvania Company should be so acquired by the defendants, they were to make use of the same to prevent the said Pennsylvania Company from engaging in or carrying on in whole or in part its business, and were thereby to bring about the ruin of said Pennsylvania Company through inaction and the destruction of its property and facilities through decay, and to eliminate and entirely prevent its competition with the defendant corporation, the said American Company.

The indictment then sets forth a number of overt acts alleged to have been done in pursuance of the conspiracy and to effect its object. They are briefly as follows:

1. That on December 30th, 1903, Kissel, who is described as the agent for certain undisclosed lenders, entered into an agreement with Segal which recited that Segal desired to borrow One million two hundred and fifty thousand ($1,250,000) dollars, on a note running for twelve months, with interest at six per cent. payable quarterly on the 2nd day of April, July, October and January, and that he would deposit as security for the payment of this note and other liabilities certain securities, including $500,000 worth of the bonds and 26,000 shares of the

capital stock of the Pennsylvania Company, the right to the stock and all voting and other rights which belonged to it, together with a power of sale in case of non-payment of the note, and whereby it was agreed by Segal that he would arrange that the absolute voting power of the stock should be in the lenders, that they should have the right to use said voting power as it might be suitable to aid or effectuate the purposes of the contract, that he would arrange that the majority of the directors of the Pennsylvania Company should be nominated by the lenders to continue as such directors as long as any part of the loan remained unpaid, and that during that period the control and possession of the property of the Pennsylvania Company should be effectually subject to the control of the said board of directors and its sugar refinery should be run or operated or do business only as should be directed by the board of directors; and that the borrower should have the right to terminate the loan on the first of October, 1904, and not before (overt act No. 1, rec. p. 7).

2. That on the 30th of December, 1903, Mr. Harned, as president of the Champion Construction Company, executed on behalf of that company a consent to the use of the 26,000 shares of the capital stock of the Pennsylvania Company, in accordance with the terms of the above mentioned contract (overt act No. 2, rec. p. 9).

3. That on the same day Mr. Harned on behalf of the Champion Company executed a proxy and power of attorney to Mr. Kissel, empowering him to vote upon its stock in the Pennsylvania Company, which by its terms

was made irrevocable pending the life of the agreement between Mr. Segal and Mr. Kissel (overt act No. 3, rec. p. 10).

4. That on the same day, Mr. Kissel attended a meeting of the board of directors of the Pennsylvania Company, and as a director thereof voted in favor of and secured the adoption of a resolution of that board "to the effect that said Pennsylvania Sugar Refining Company should thereafter refrain from carrying on its business until the further order of said board of directors" (overt act No. 4, rec. p. 10).

5. That on the 31st of December, 1903, and the 4th of January, 1904, the American Company paid to Mr. Kissel the moneys necessary to enable him to fulfill his obligations under the contract of the 30th of December, 1903, by paying to Mr. Segal the amount agreed to be loaned to him; and that Mr. Kissel furnished to the company on the same days written receipts acknowledging the purpose for which these sums were paid to him (overt acts Nos. 5, 6, 7 and 8, rec. pp. 11–13).

6. That on the 4th of January, 1904, Mr. Kissel executed a written statement of account, addressed to Segal, among the items of which appear loans of December 30th and December 31st, 1903 (overt act No. 9, rec. p. 13).

7. That on the 4th of January, 1904, Mr. Kissel wrote a letter addressed to the American Company, in which he reported that he held for them the various securities and documents received in pursuance of the agreement of December 30th, 1903, and that he had acquired a safe de-

posit box and had deposited those securities therein (overt act No. 10, rec. p. 13).

8. That on the 5th of January, 1904, the American Company caused to be written a letter which set forth that it undertook to hold Mr. Kissel harmless by reason of the execution of the agreement of December 30th, 1903, and any action that had been taken under it (overt act No. 11, rec. p. 15).

9. That on the 23rd of May, 1905, Messrs. Donner, Senff, Frazier and Parsons attended a meeting of the executive committee of the board of directors of the American Company, but what was done at such meeting is nowhere alleged (overt act No. 12, rec. p. 15).

10. That on the 13th of February, 1907, the defendants Thomas, Donner, Senff and Mayer, directors of the American Company, attended a meeting of the board of directors and voted for a resolution to send to the president of the company a letter giving him a copy of the resolution of the stockholders in reference to proceedings in the Segal matter, asking him to cooperate in defending against any such proceeding, agreeing as to him that the company would assume the responsibility of what had occurred in the Segal matter, and that it would defend, protect and indemnify him, &c., and a similar resolution in respect of the defendant John E. Parsons, counsel of the company (overt act No. 13, rec. p. 15).

11. That on the 15th of February, 1907, the defendant John E. Parsons wrote a letter to the secretary of the American Company, in which he stated that for some reason Mr. Earle had delayed proceedings, that the De-

partment of Justice ought to refuse, and that Mr. Parsons hoped it would refuse to aid Mr. Earle's claim, that Mr. Johnson had described the claim as farcical, and that he (Parsons) both on the company's account and on his own, would cooperate in defending any proceedings which might be taken by Mr. Earle (overt act No. 14, rec. p. 16).

12. That on the 3rd of May 1907, the defendant Kissel wrote a letter to the American Company enclosing an account for disbursements for rent of safe deposit vault, legal services, &c. (overt act No. 15, rec. p. 17).

13. That on the 10th of May, 1907, the American Company settled and paid the claim of Kissel for the above-mentioned disbursements (overt act No. 16, rec. p. 17).

14. That on the 12th of November, 1907, the defendants Thomas, Donner, Senff, Frazier, Mayer and Parsons attended a meeting of the directors of the American Company, but what was done at said meeting is nowhere alleged (overt act No. 17, rec. p. 18).

15. That on the 19th of April, 1909, the defendant John E. Parsons wrote a letter in which he referred to an advertisement in regard to the Pennsylvania Company bonds, and stated that he would send such advertisement to Mr. Johnson, who had the matter in charge, and that he thought it undesirable to submit the bonds to the action of a probably hostile committee (overt act No. 18, rec. p. 18).

The defendant Harned is not charged with any act done by him subsequent to January 4th, 1904, and the only act charged against Kissel after that date is that on May 3rd,

1907, he rendered an account for disbursements, which was paid on May 10th, 1907.

There is no allegation in the indictment that the conspiracy contemplated a control which should endure for any definite period beyond the term of one year, nor any allegation that such control actually did continue, nor any allegation that the alleged conspirators agreed to cooperate and continue to act together after July 1st, 1906.

There is no allegation that the proxy on the stock of the Pennsylvania Company was intended to be or was actually renewed or continued in force in favor of the American Company or its agent. Under the Pennsylvania statutes, this proxy dated December 30th, 1903, expired and was of no force and effect after the expiration of two months from its date (Laws Penna., Act of March 5, 1903, No. 17). There is no allegation that the American Company or its agent ever voted or could have voted said stock under said proxy.

There is no allegation that the right to select a majority of the board of directors of the Pennsylvania Company, which by the terms of the contract was accorded to the American Company, was ever exercised by it or that it secured control of the Pennsylvania Company.

There is no allegation that the resolution of the board of directors of the Pennsylvania Company, that it shoud cease its operations until further orders, ever became effective or was acted upon; nor is there any allegation that such resolution was "continuously unrevoked and effective" as stated in the government's brief (pp. 36–37).

There is no allegation that the Pennsylvania Company ever for a single day ceased its operations, or that for a

single day it abstained from competition with the American Company, or was in fact closed or kept closed by any act of the defendants or otherwise.

There is no allegation showing that any act of any of the defendants within the three years continued or renewed the conspiracy or tended to effect the object thereof or had any relation whatever or was in any way germane to the object of the original conspiracy of 1903.

Briefly summarized, the indictment charges that the defendants engaged in a conspiracy to restrain interstate and foreign trade and commerce and to monopolize such trade and commerce by procuring for the American Company the temporary control of the Pennsylvania Company, a potential rival, through an agreement whereby the voting power of the majority of the stock of the Pennsylvania Company was to be vested in the American Company for a period of one year with the intention of protracting that control for an unspecified period beyond that year, and of employing that control to the end of preventing the Pennsylvania Company from engaging in competition with the American Company during the period of control, and, through the decay of its facilities, of entirely eliminating, during the period of control, the competition which otherwise might have arisen. It also charges that the conspiracy was followed by a contract and by acts in pursuance thereof whereby on the 30th day of December, 1903, the control of the majority of the stock of the Pennsylvania Company was vested in the American Company, the right to vote that stock was vested in the American Company for a period of one year, and the board of directors of the Pennsyl-

vania Company was procured to resolve that it should engage in no business until the further order of the board. Everything stated in the indictment contemplated completion within a period long prior to July 1, 1906, or is clearly consistent with such an intention.

Each of the pleas in bar of the defendants Kissel and Harned avers that the alleged offenses charged in the indictment and in each count thereof were barred by section 1044 of the Revised Statutes because the indictment had not been found within three years next after the offenses therein alleged or any of them were committed; that more than three years had elapsed between the commission of the offenses alleged and the finding of the indictment, and that said defendants had not been fugitives from justice within the intent and meaning of section 1045 of the Revised Statutes (pp. 34, 53). Each of said pleas further averred that during the three years the defendant did not directly or indirectly do any act or thing whatsoever in aid or furtherance of or to the effect or tending to effect the object of any conspiracy or conspiracies in restraint of trade or commerce among the several states or with foreign nations; that within said period of three years he was not a member of and did not engage, participate or take part in any such conspiracy or conspiracies; that the acts and things alleged in said indictment to have been done within the period of three years whether by him or by others were not acts or things in aid or furtherance of or to effect or tending to effect the object of any such conspiracy, and that the alleged overt acts and things averred in said indictment to have been done by others within the three years were each

and all of them done without said defendant's participation, knowledge, consent, agreement, authority, or ratification (rec. pp. 32–33 and 52–53). It is also alleged in the special plea of the defendant Kissel that a receiver was appointed for the Pennsylvania Company in October, 1906 (rec. p. 33), and that he took and has ever since retained exclusive possession of its property and exclusive control of its affairs and business.

It will be seen by reference to these pleas that the commission of the original offense in 1903 is not attempted to be denied, and that the only issue tendered was whether or not the alleged offenses had been committed within the three years preceding the finding of the indictment.

To these pleas in bar, the United States demurred on the ground that the facts as set forth therein in effect constituted pleas of not guilty and demanded judgment that the pleas were insufficient in law and be overruled. (pp. 54, 55). The case duly came on for hearing on the issues of law raised by the demurrer of the United States, which were as follows:

1. Whether the defense of the statute of limitations could be set up by special plea in bar.

2. Whether the special pleas in the case at bar were insufficient as amounting to the general issue.

3. Whether the crime of conspiracy under the Sherman Act was essentially a continuous offense, and, if so, whether the pleas in bar were insufficient because failing to allege the abandonment or termination of the conspiracy prior to July 1, 1906.

In considering these questions, the counts charging the

substantive offenses of monopolizing or of attempting to monopolize will not be discussed, for the government has offered no argument to sustain these counts against the plea of the statute of limitations. It must be apparent upon the barest inspection of the several counts charging such offenses that they do not specify any time within three years as the date of the commission of the offenses charged, and that they aver no facts which would suffice to charge the commission of a substantive offense at any date later than the 4th of January, 1904. The learned court below criticized the practice of indicting for conspiracy when the substantive crime is alleged to have been committed (rec. p. 61). In support of such criticism see *United States* v. *McMahon*, 175 Fed. 296, 298; *The Queen* v. *Selsby*, 5 Cox C. C. 497; *Regina* v. *Boulton*, 12 Cox C. C. 87, 93; *United States* v. *Rindskopf* 6 Biss. 259, 266, 267; Wharton, Crim. Law, 10th ed., vol. II, sec. 1346. The discussion in this brief will, therefore, be confined to the conspiracy counts, to which the discussion was limited in the court below and in the opinion of Judge Holt (rec. pp. 56–61).

The court below held the pleas sufficient to set up the the defense of the limitation, and further held on the merits that it did not appear on the record before it that the offenses charged or any of them had been committed within three years preceding the finding of the indictment. It, therefore, overruled the demurrer, and as the United States did not ask leave to plead over, judgment was directed to be entered overruling the demurrers of the United States to the special pleas in bar, sustaining said pleas as sufficient in law, and dismissing the indictment as to the defendants Kissel and Harned.

The United States thereupon took the present writ of error under the Criminal Appeals Act of 1907, 34 Stat. 1246.

The United States having demurred to the special pleas in bar, the facts duly alleged in the pleas stood admitted, and the court below properly considered as before it the question of the sufficiency of the indictment, taken in connection with the pleas, to show the actual commission of any of the alleged offenses within the three years limitation. It is the settled rule in criminal, as well as in civil cases, that when a defendant's pleading is demurred to, he is entitled to challenge the sufficiency of the indictment. *United States* v. *Lawrence*, 13 Blatchford 295, 299; *Rex* v. *Fearnley*, 1 T. R. 316, 320; *State* v. *Sweetsir*, 53 Me. 438, 440; *People* v. *Krummer*, 4 Park. Cr. R. 217, 221; *Commonwealth* v. *Trimmer*, 84 Pa. St. 65, 70; Archbold's Crim. Plead., Evid. & Prac., 23rd Eng. ed., p. 167, Bishop's New Crim. Proc., vol. 1, sec. 777; Wharton's Crim. Plead. & Prac., 9th ed., sec. 402. The government's theory substantially was that notwithstanding the allegations of the plea, which it admitted by its demurrer, the offense of conspiracy was so essentially a continuous crime that the plea should have alleged the abandonment or termination of the original conspiracy at a time beyond the three years of the limitation.

The Act of July 2, 1890, known as the Sherman Act, under which the indictment in the case at bar was found, defines the crimes as follows (26 Stat. 209):

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every

person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

This criminal statute is to be construed in connection with section 1044 of the Revised Statutes, which reads as follows:

"No person shall be prosecuted, tried, or punished for any offense, not capital, . . . unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed."

The question on the merits, therefore, is whether it appears on this record that the indictment was found within three years after the alleged offense of conspiracy was committed.

The argument will be divided as follows: (I) the right to set up the defense of the limitation by special plea, pp. 17–33, (II) an analysis of the government's contentions on the merits, pp. 33–44, (III) the nature of the offense of conspiracy, pp. 45–83, (IV) the alleged overt acts, pp. 84–100, (V) the sufficiency of the pleas as to form, pp. 100–106, (VI) the objection of duplicity, p. 107, and (VII) the request of the government to be allowed to plead over, pp. 108–113.

I.

THE DEFENSE OF THE STATUTE OF LIMITATIONS MAY BE AVAILED OF BY SPECIAL PLEA IN BAR.

The first question which the government presents for the consideration of the court is whether the defense of the limitation in criminal cases under section 1044 of the Revised Statutes can be set up by special plea in bar. In the printed brief submitted by the government to the trial court, the following was stated:

> "It is conceded by the Government that the statute of limitations can be set up by a special plea in bar."

It was at first the practice in the lower federal courts to permit a defendant to raise the defense of the limitation preliminarily by demurrer and thereby avoid further prosecution and trial, although it was recognized that it could also be set up by special plea. *United States* v. *Watkins*, 3 Cr. C. C. 441, 551; *United States* v. *Six Fermenting Tubs*, 1 Abb. U. S. 268, 271; *United States* v. *Dustin*, 25 Fed. Cas. No. 15,012, p. 946; *United States* v. *Shorey*, 27 Fed. Cas. Nos. 16,281 and 16,282; *United States* v. *Coggin*, 3 Fed. 492.

This practice was overruled and the rule of federal procedure applicable in criminal cases was settled by this court at the December term, 1872, in *United States* v. *Cook*, 17 Wall. 168. In that case Mr. Justice Clifford said (at p. 179):

> "Accused persons may avail themselves of the statute of limitations by special plea or by evidence under the general issue, but courts of justice, if the statute contains exceptions, will not quash an indict-

> ment because it appears upon its face that it was not found within the period prescribed in the limitation, as such a proceeding would deprive the prosecutor of the right to reply or give evidence, as the case may be, that the defendant fled from justice and was within the exception."

This authoritative declaration of the proper rule of procedure has never been qualified or limited by the court. On the contrary, the practice has been repeatedly sanctioned. Thus, in *United States* v. *Norton*, 91 U. S. 566, and *United States* v. *Hirsch*, 100 U. S. 33, the defense of the limitation was set up by special plea in bar to which the United States demurred, and upon such demurrer the whole controversy was determined. So, also, in the case of *United States* v. *Irvine*, 98 U. S. 450, there was a special plea in bar, setting up the defense of the limitation, which was sustained. In the more recent case of *United States* v. *Hewecker*, 79 Fed. 59, 60; 164 U. S. 46, the defense of the limitation was set up by special plea, to which the United States demurred, and the demurrer was overruled by the trial court. In the still more recent case of *United States* v. *Brace*, 149 Fed. 874, 876, the defendant filed a special plea of the statute of limitations, to which the United States demurred, and upon this demurrer the controversy was decided.

In Bishop's New Criminal Procedure, vol. 1, sec. 799, sub. 5, the author says:

> "The statute of limitations may be pleaded specially, and sometimes it is. Yet this defence is permissible under the general issue."

The following is a list of additional federal cases in which the defense of the statute of limitations was actually set up by special plea in bar: *Adams* v. *Woods*, 2 Cranch.

336; *United States* v. *Wells*, 163 Fed. 313, 314; *United States* v. *Comstock*, 162 Fed. 416; *Ex parte Townsend*, 133 Fed. 74, 75; *McGlinchy* v. *United States*, 4 Cliff. 312, 314; *Perkins v. United States*, 4 Cliff. 321, 322; *United States* v. *Maillard*, 4 Ben. 459, 460; *United States* v. *Wright*, 28 Fed. Cas. No. 16,770, p. 789; *United States* v. *Shorey*, 27 Fed. Cas. No. 16,280, p. 1070; *Stimpson* v. *Pond*, 2 Curtis C. C. 502, 503; *United States* v. *Platt*, 27 Fed. Cas. No. 16,054a, p. 546; *United States* v. *Mayo*, 1 Gall. 397; *United States* v. *Slacum*, 1 Cranch C. C. 485. It is true that some of these cases were civil suits for penalties; but when it is recalled that in such suits the defense of the statute of limitations is open to the defendant under the general issue (Story, J., in *Parsons* v. *Hunter*, 2 Sumn. 419, 426), the precise analogy upon this point between penal civil suits and criminal prosecutions is apparent.

The same rule as to setting up the defense by special plea once obtained in the courts of New York (see *People* v. *Roe*, 5 Parker C. R. 231), and may be presumed to have been the law which existed when the Constitution of the United States was adopted in 1789. *United States* v. *Reid*, 12 How. 361. It is, however, no longer permissible in New York under the Code of Criminal Procedure, sec. 332, which abolished the common law rules as to special pleas and limited pleas in bar to the plea of former judgment of conviction or acquittal, which may now be pleaded with or without the plea of not guilty.

The suggestion in the government's brief that under the English practice at common law there are no precedents to be found of pleas in bar setting up the defense of the statute

of limitations is entirely immaterial, for the reason that there was in England prior to the nineteenth century no limitation of prosecutions in criminal cases except under the Treason Act of 1695. Wood on Limitations (Gould's 3rd ed.) sec. 28; Banning on Limitation of Actions (Brown's 3rd ed.) p. 253; Stephen's History of the Criminal Law of England, vol. II, pp. 1, 2. So, likewise, as to the fact that in New York, Canada and other jurisdictions, the statutes which regulate criminal procedure do not permit the defense of the limitation to be set up by special plea in bar. That may furnish an argument to be addressed to Congress for the purpose of having the law changed, but is not a ground upon which this court should be asked to overrule and set aside its own decision and the long-established practice thereunder.

The cases which have held that a defendant cannot at the same time plead the general issue together with a special plea of confession and avoidance do not in any way question the right to interpose one or the other plea at the election of the accused. The only reason why the accused cannot do both is the rule of the common law against double pleading in criminal cases. Had the statute of 4 Anne, c. 16, §§ 4 and 5, which permitted double pleading in civil cases, not expressly excluded criminal cases, double pleading would have been allowable at common law in criminal cases. Thus, in the case of the *United States* v. *Shorey*, 27 Fed. Cas., No. 16,280, p. 1070, the Circuit Court, including Mr. Justice Clifford, said:

> "Special matter which is in law a bar to an indictment, may in certain cases be so pleaded in misdemeanors, but the rule is well settled that the defendant cannot plead specially in bar of the indict-

ment if he pleads the general issue, as double pleading is unknown in criminal procedure. 1 Starkie, Cr. Pl. 335; *Heyrick* v. *Foster*, 4 Term R. 701."

So far as a careful investigation has disclosed, there is no federal case holding that a defendant in a criminal proceeding may not set up the defense of the statute of limitations by special plea in bar. The fact that the defense may also be availed of under the general issue, in no way militates against the right to present it by special plea in bar if the accused desires to do so. The suggestion that the right to plead specially might be abused for purposes of delay would apply equally to the right to demur whenever the question sought to be raised by demurrer could also be raised under the general issue. The right to demur has existed for many years, and there is no evidence or serious complaint that it has been abused. But, however that may be, the possibility of abuse is not the test, any more than the convenience of the prosecution is the measure of the legal rights of the defendant.

The argument of the government that to permit a special plea of the limitation might involve two trials, if a sound objection, would apply to all pleas in bar, for in each case the nature and circumstances surrounding the alleged commission of the crime might have to be proved. Thus, the plea of former jeopardy, or of immunity, or of pardon might well involve the necessity of proving that the offense charged and the one for which the defendant had obtained immunity or pardon or had suffered jeopardy were identical.

The government further urges in its brief (p. 26) that it is quite impossible to prove when an offense was committed without proving the actual occurrence of all the

facts essential to constitute the offense. This argument, if a sound objection in this case, would deprive every accused person of the right to set up the defense of limitation or immunity or former jeopardy by special plea in bar.

But is it true that all the facts would have to be proved in the present case on the trial of the plea in bar as fully as on the trial under the general issue? Quite the contrary would seem to be the fact. In the first place, the original conspiracy, its nature, scope and intent as alleged in the indictment and evidenced by documents alleged in the indictment would stand admitted on the trial of the special plea. No fact alleged in the indictment—not even the doing of the overt acts—would have to be proved. They would stand admitted for the purposes of such a trial. All that would be necessary would be to show how and in what manner the offense of conspiracy had been renewed, or how and in what manner the alleged overt acts, as matter of fact, could tend to effect the object of the original conspiracy. The issue on a traverse of the plea would, therefore, necessarily be far simpler and much narrower than if the prosecution had to prove all its allegations as on a trial under the general issue.

Aside, however, from the force and effect of the precedents above cited, which recognize the right to avail of the defense and protection of the limitation by special plea in bar, it is submitted that such a defense is essentially one which ought to be set up and disposed of by special plea in bar rather than on the trial of of the general issue if an accused is advised so to plead. The defense of the limitation presents an issue that

should be preliminarily disposed of, so that, if successful, the expense, delay and harassment of a trial on the merits may be avoided because wholly unnecessary and legally unwarranted. In the majority of cases, such a procedure will tend to the due, orderly and humane administration of the criminal law, and, if the defense be well founded, the expense and delay of a trial on the merits may be thus avoided—a result merciful and just to the accused and convenient to the prosecution. It is true that frequently the point is so doubtful that an accused person prefers to put the prosecution to its proof of the commission of the alleged crime and to reserve the defense of the limitation for the trial, and that the law in its solicitude to secure to an accused every legal protection will permit this to be done; but where an accused is advised that, as matter of law, the crime, if ever committed, is clearly barred, he ought to have the right to raise that single issue by special plea so as to obtain a prompt and inexpensive termination of the prosecution against him, just as he has the right to raise other questions of law preliminarily by demurrer and thereby prevent further prosecution. Ordinarily, indeed, it will be desirable that the government should not be compelled to go to the expense of preparing and trying a case which could and should be promptly disposed of on a special plea of the limitation. If a special plea in bar be interposed, the case can be at once disposed of on demurrer or traverse to the plea. If the facts are correctly alleged in the plea, the issue is narrowed and simplified to one of law and can be much more readily disposed of than if the point were reserved for a trial on the merits before a jury. There are ex-

ceptional cases where the trial of issues of fact under such a plea in bar may be necessary, but exceptional considerations of special convenience or inconvenience cannot fix or determine the general rules of pleading and practice applicable to all cases. The accused is not to have one rule of pleading applied because the prosecutor thinks the case simple and another and different rule if the prosecutor happens to think it complicated.

The defense of the statute of limitations is on principle of the same general character and nature as the plea of former jeopardy or immunity or pardon. It is essentially a plea in bar of further prosecution. It confesses the crime, but relies on a statutory or constitutional exemption in avoidance. The settled rule at common law was that the defense of former jeopardy, *i. e.*, autrefois acquit or autrefois convict, had to be specially pleaded and could not be availed of under the general issue or by motion in arrest of judgment. Wharton Crim. Pl. & Pr., 9th ed., §477; Bishop's New Criminal Procedure, vol. I, §§742, 799, sub. 3, and 806. It is true that special pleas were generally confined to former jeopardy and that no precedents are to be found at the early common law of pleas in bar setting up the defense of the statute of limitations, but the reason is, as stated above, that there was in the English common law no limitation of criminal prosecutions. On principle and by analogy, it is certain that if the defense of limitation were as ancient as the defense of autrefois convict, the common law would also have held it to be available only under a special plea in bar. But special pleas were especially dangerous at the common law, because of the refusal of the

courts to permit an accused to plead over if he failed to maintain his plea. As criminal procedure became more and more humane, the courts, therefore, allowed defendants to avail themselves under the general issue of defenses which should more properly or logically be presented by special pleas in bar. Thus, the defense of immunity was held to be available under the plea of not guilty. *Regina* v. *Skeen*, 8 Cox C. C. 143, 153, 158. This indulgence, however, was not intended in any way to affect the substantial right of an accused to plead specially and thereby bar further prosecution and jeopardy.

A further consideration in support of the practice of filing special pleas in bar setting up the defense of the limitation is afforded by the act of March 2, 1907, itself. At the time this act was passed, Congress clearly contemplated the practice of filing special pleas in bar in criminal cases, for the act expressly authorizes appeals by the United States direct to this court—

> "From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

This act of Congress, it is generally understood, was proposed and drafted by the Department of Justice specially to meet such cases as *United States* v. *Armour & Co.*, 142 Fed. 808, where a special plea of immunity had been sustained. There is no essential difference between the defense of the limitation and the defense of immunity, for each is based on a statutory amnesty and seeks to bar further prosecution, and in either case it might be necessary to take considerable testimony. In the debates in Congress, defenses setting up the statute of limitations and

immunity were specifically referred to in connection with this clause relating to special pleas in bar. Cong. Rec. 59th Cong. Sess. II, vol. 41, part 4, pp. 2194, 2749, 2753, 3044. The Criminal Appeals Act might be deprived of much of its intended scope and usefulness if it were now held that such a defense as limitation or immunity could not be set up by special plea in bar. If it be the true rule of procedure that these defenses must hereafter be set up under the general issue and tried at the same time as the trial of the plea of not guilty, then the United States can never appeal in such cases, and the act of 1907 will be very much narrowed and its operation greatly limited. The only way in which the purpose of Congress can be reasonably effectuated is to permit special pleas in bar raising such questions as limitation, immunity and former jeopardy, so that, if serious questions of law are involved and decided in favor of the accused, the government may promptly bring the questions involved before this court for review.

It is further submitted that section 1044 of the Revised Statutes should be liberally construed in favor of individual rights, and in that light such procedure should be favored as will tend to save an accused person from prosecution and trial, if he duly claims the statutory amnesty. In Wharton's Cr. Pl. & Pr., 9th ed., sec. 316, the author says:

> "Hence it is that statutes of limitation are to be liberally construed in favor of the defendant, not only because such liberality of construction belongs to all acts of amnesty and grace, but because the very existence of the statute is a recognition and notification by the legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned

> to it fixed and positive periods in which it destroys proofs of guilt. Independently of these views, it must be remembered that delay in instituting prosecutions is not only productive of expense to the State, but of peril to public justice in the attenuation and distortion, even by mere natural lapse of memory, of testimony. It is the policy of the law that prosecutions should be prompt, and that statutes enforcing such promptitude should be vigorously maintained. They are not merely acts of grace, but checks imposed by the State upon itself, to exact vigilant activity from its subalterns, and to secure for criminal trials the best evidence that can be obtained."

The above language of Dr. Wharton has frequently been quoted with approval by the courts. *Beattie* v. *People*, 33 Ill. App. 651; *Lamkin* v. *People*, 94 Ill. 501. See also Bishop on Statutory Crimes, 3rd ed., sec. 259; *Commonwealth* v. *Haas*, 57 Pa. St. 443; *People* v. *Lord*, 12 Hun 282; *People* v. *Austin*, 63 N. Y. App. Div. 382; *Moore* v. *State*, 43 N. J. L. 203; *State* v. *Asbury*, 26 Tex. 82.

In Bassett on Crim. Plead., 2nd ed., secs. 184, 64, it is said of the statute of limitations that

> "It would seem that the statute in its effect, as a bar, is mandatory; so that its running being disclosed the accused cannot waive the bar. . . . The statute is based upon public policy, and individuals cannot repeal it; it not being for their peculiar benefit but in the interest of the public. . . .
>
> "Such statutes are founded on public policy, as statutes of repose, . . . not to be evaded by construction, but to be regarded with favor by courts and so liberally interpreted as to advance the policy they are designed to promote."

In Gillett on Crim. Law, 2nd ed., sec. 52, the rule of interpretation of the statute of limitations is stated thus:

> "Like all other criminal statutes these acts are to

be construed strictly against the defendants and liberally in their favor."

Chief Justice Maxwell in his work on Criminal Procedure (p. 1) says:

> "In criminal cases, where the bar [of the statute of limitations] is complete the offense is blotted out, and cannot again be called into existence at the option of the state."

See also Judge Philips' dissenting opinion in *Ware* v. *United States*, 154 Fed. 577, 593.

Few of the opinions of Mr. Justice Story have been more often quoted with approval at home and abroad than his opinion in *Bell* v. *Morrison*, 1 Peters 351, 360, where, discussing the doctrine of limitation in civil cases, he said:

> "It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light, as an unjust and discreditable defence, it had received such support, as would have made it, what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses."

If this be a wise and sound view in civil cases, how much more emphatically should it be the rule in criminal cases?

The views expressed in the courts and text writers are singularly applicable to the case at bar, and seem to point out the justice of favoring the defense by permit-

ting it to be raised preliminarily by special plea in bar.

Nearly six years had elapsed between the loan of $1,250,000 to Segal in December, 1903, and the finding of the indictment on July 1st, 1909. In the meantime, the alleged offense had been investigated by the Department of Justice of the United States, and it had failed to take proceedings. Indeed, the records of Congress show that the Attorney General of the United States was of opinion that there had been no violation of the Sherman Act in view of the authoritative interpretation of this court in the case of *United States* v. *E. C. Knight Company*, 156 U. S. 1. The matter had been reported to Congress and it had apparently acquiesced in this view. (See Sen. Doc. No. 687, Sixtieth Cong. second sess.; *N. Y. Indians* v. *United States*, 170 U. S. 1, 32; *Knight* v. *United States Land Assn.*, 142 U. S. 161.) Civil litigation had been instituted under section 7 of the act and damages in the fabulous amount of $30,000,000 were claimed (160 Fed. 144; 166 *ibid.* 254). Every temptation to distortion had arisen by reason of the pecuniary interest or cupidity of witnesses.

There cannot be the slightest doubt that in December, 1903, the bar of the United States regarded the *Knight* case as authoritatively settling the point that the acquisition and control by one manufacturing company of a competing manufactory was not within the scope of the prohibitions of the Sherman Act. In December, 1903, the *Knight* case must have seemed particularly in point, for it had involved an attempt by the same American Company to obtain control of four Philadelphia refineries,

which had theretofore been competitors, and the court had held that such a transaction was not an offense under the Sherman Act. The learned judge before whom the civil suit was tried held that the *Knight* case was controlling (160 Fed. 144); and it was not until the decision of the Circuit Court of Appeals in December, 1908, that it was held that the allegations of the complaint took the case out of that ruling. 166 Fed. 254. It may be true that the *Knight* case has since been modified, and it may be that it will be overruled; but surely counsel and parties were justified in December, 1903, in acting under its authority. An act which, according to authoritative decisions, was not criminal when done, ought not to be rendered criminal years afterwards by reason of a change of decision. *State* v. *O'Neil*, 126 N. W. 454. The policy of the statute of limitations tends to prevent any such injustice.

The first federal statute of limitations was contained in section 32 of the original Crimes Act of April 30th, 1790, 1 Stat. 119. The language then used was that—

> "No person . . . shall . . . be *prosecuted, tried or punished* for any offence, not capital . . . unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence."

This provision has remained until the present day, and is now section 1044 of the Revised Statutes.

The language used by the First Congress indicates, as plainly as words can disclose any definite thought, that it was the intention of Congress that an accused person should be neither *tried nor prosecuted* if three years had elapsed since the commission of the

alleged offense. The command of the statute is explicit, and the duty of prosecutors and courts cannot be doubtful. According to the plain language of an act of Congress, an accused is entitled, as of right, *not* to be put to the injury and expense and jeopardy of being *prosecuted* or *tried* on the merits unless the offense has been committed within the three years. This humane and beneficent purpose of Congress would in many cases be wholly defeated if the rule were that an accused person was in every case to be prosecuted and tried on the general issue, notwithstanding the bar of the limitation might be perfectly clear and indisputable.

Can any one doubt that, if the framers of the Crimes Act of 1790 had been asked how a person could avail of the protection and intended amnesty of the statute so as not to be *prosecuted* or *tried* for offenses to which the limitation was to apply, they would have answered that a special plea in bar would prevent further prosecution or any trial on the general issue. If they had been told that the govenment would urge and the courts might hold that the protection of the limitation could not be availed of in any case except on a trial of the general issue, would they not readily have perceived the inappropriateness and futility of the language they were using, commanding that no person should be prosecuted or tried? They surely did not intend to leave it to the discretion of prosecuting officers whether or not to prosecute or try the accused.

The first case that came before this court under section 32 of the act of April 30, 1790 was in 1805 (*Adams* v. *Woods*, 2 Cr. 336, 340). It was a *qui tam* action on behalf

of the United States and an informer. The defense of the statute of limitations was set up by special plea in bar, and the case was disposed of on demurrer to that plea. Chief Justice Marshall, speaking for the court, among other things, said:

> "But if the words of the act be examined, they will be found to apply not to any particular mode of proceeding, but generally to any prosecution, trial, or punishment for the offence. . . . But it is declared, that 'no person shall be prosecuted, tried, or punished'; words which show an intention, not merely to limit any particular form of action, but to limit any prosecution whatever."

It may fairly be said that if an accused cannot set up the statute of limitations by plea in bar, but must await prosecution and trial on the merits, the words of the statute will be deprived of much of their significance and effect and the character of the provision essentially changed. The statute would then be made to read as if the words *prosecuted* and *tried* were totally useless; and the result of the construction insisted upon by the government would be, in Chief Justice Marshall's language, *supra*, at p. 341, "to overrule express words, and to give the statute almost the same construction which it would receive if one distinct member of the sentence was expunged from it."

In the recent case of *Heike* v. *United States*, 217 U. S. 423, 429, which arose under a plea in bar setting up the defense of immunity, the court distinctly said that the defendant had "a right to raise an issue of law upon the indictment by demurrer, to plead in bar, or to plead the general issue." The only question involved was one of appellate procedure after a defendant's plea in bar had been overruled and he had asked leave and elected to

enter a plea of not guilty, which remained untried. There was no final judgment to review, and this court consequently had no jurisdiction.

The objections of the government to the form of the pleas and other questions of practice will be considered *infra*, pp. 100–107. It may be of aid first to analyze the contentions of the government on the merits and then to determine the nature of the crime of conspiracy.

II.

The contentions of the United States analyzed.

Sections 1 and 2 of the Sherman Act define three distinct crimes, namely, conspiracy, attempt to commit a crime, and a substantive crime. Under section 1 making any contract or engaging in any combination or conspiracy in restraint of trade is made a misdemeanor; and under section 2 monopolizing, attempting to monopolize, or conspiring to monopolize is likewise made a misdemeanor. The acts essential to constitute and the proof necessary to establish the actual commission of these several crimes are different, as are likewise the rules of law which govern their consideration. In conspiracy, the act of agreeing or conspiring is the offense; in attempting to commit a crime, the act must be more than mere agreement and preparation and involve a certain nearness to the contemplated result, and in substantive crime the result must have been accomplished. The averments of the indictment now before the court present only a case of conspiracy, for none of its

allegations can, by any latitude of construction, be held to duly charge the commission of the offense either of attempting to monopolize or monopolizing at any time after July 1, 1906.

It will be shown, in the following point (p. 45) that the gist or gravamen of the crime of conspiracy consists of the act of agreeing or conspiring, and not of the overt acts done to effect its object, and that the offense is essentially non-continuous. Before discussing these questions and the leading cases at unavoidable length, it may be of aid at once to appreciate the theories of the prosecution in the case at bar.

The principal contention of the government on the merits seems to be that the offense of conspiracy is necessarily continuous, that no act by the accused or by anybody else within three years is necessary to make the antecedent conspiracy an indictable offense, and hence that "it is altogether immaterial whether or not any overt act was done by any conspirator within three years before the indictment was found" (brief U. S. pp. 32, 38). The court is asked to hold, if we do not misapprehend the argument on the part of the United States, that the criminal offense of conspiracy may be deemed or presumed to have been *committed* within the three years' limitation without proof of a single act of any conspirator, simply because the antecedent conspiracy contemplated indefinite future acts (brief U. S. p. 40). As every form of conspiracy with which the law deals involves future acts and future effects or consequences, the result would be that the federal criminal law of conspiracy would not be punishing present acts, but intentions evidenced

only by acts long since barred by the statute, and that the statutory limitation would be abrogated in almost all conspiracy cases. Thus, according to the contention of the government, any party to a conspiracy might be indicted and punished criminally ten, twenty, or even fifty years after he had committed the act of conspiring, although in the meantime he might not have done a single act in pursuance of the conspiracy or to effect its object. Indeed, it was contended by the government in the court below that the only way in which the defendants could avail of the three years' limitation would be by showing affirmatively the abandonment of such conspiracy, and such contention is practically now repeated (brief U. S. pp. 40–42). In its final analysis, the theory of the government is that all that the prosecution would have to prove on the trial of this indictment would be the original engaging in a conspiracy in restraint of trade or conspiring to monopolize in December, 1903, without showing a single act within the three years of the limitation, and that the burden of proof would then be on the defendants to show that the original conspiracy had been actually abandoned or terminated and not continued into the period of the limitation.

An examination of the authorities cited below will show that in no case has it ever been held or even suggested that a man could be convicted of the crime of conspiracy without proof of some act done, whether by himself or a fellow-conspirator, within the period of limitation. The reasoning of the cases may differ, but all agree in holding or recognizing that some *act* or *deed* must be done within the time limited by statute. Even in the case of essentially con-

tinuous crimes, such as cohabitation or maintaining a nuisance, it is unreasonable to assume, what no court has ever intimated, that an accused, pleading the statute of limitations, could be convicted without proof of the actual continuance of the forbidden state within the period of the limitation, and this, of course, could only be shown by specific acts.

The defendants submit that the true test—the criterion of criminality—in conspiracy cases, as in most other criminal cases, must be found in criminal acts presently done and not in past intentions, and that the law deals only with the present acts and conduct of men and not with their thoughts or intents evidenced by past acts; in a word, that the law seeks external standards. The rule of the Roman law is the rule of our system. *Cogitationis pœnam nemo patitur.* Holmes' Common Law, p. 65; Bishop's New Crim. Law, vol. 1, sec. 204; Wharton's Crim. Law, 10th ed., vol. 1, sec. 174. It is alike the general rule of criminal jurisprudence and the dictate of natural justice, that to constitute guilt there must be a wrongful act however criminal the intention, that an unacted intent, past or present, is never a ground of criminal liability, and that the *will* and the *deed* must go together. Both the act and the criminal intention must concur, and both must be charged in an indictment and found by a jury to justify a conviction for committing a crime. Lord Kenyon in *Fowler* v. *Padget*, 7 T. R. 509, 514.

It is not, however, the contention of the defendants that after the lapse of three years from the original act of conspiring, conspirators become immune from punish-

ment for anything that they may do in pursuance of the original criminal purpose, or to effect its object. On the contrary, whenever it is made to appear that two or more persons, animated by a corrupt intent, have consciously participated in any act in furtherance of that intent, there is established the basis of fact from which a jury may infer that then and there those persons have agreed to further that corrupt purpose, and hence that then and there they have conspired and committed anew the crime of conspiracy. For this they are none the less indictable and punishable because at some prior time one or more of them committed a like offense by agreeing, either with the same persons or with some other persons, to further the same corrupt end. Those who conspire anew, even though it be for the same object for which they have previously conspired, are no more immune from punishment for the renewal of the conspiracy than are those who attempt to commit a crime immune by reason of the fact that at some prior time they attempted to commit the same crime by the same means, or than are those who attempt to perform an agreement rendered illegal by a statute enacted after the agreement was made.

There is no reason in the nature of things why the crime of conspiracy should be treated as essentially different from any other unlawful agreement. Both consist in the act of agreeing in violation of law. No one would seriously urge that the offense of making an agreement in restraint of trade would not be barred at the expiration of three years from the time it was made, no matter how long a period of performance it might contemplate. The crime

would consist in the making of the agreement and not in the acts done to perform it. But, of course, such an unlawful agreement could be renewed and an indictment lie for such renewal or making anew by proof of acts of performance. The law would still aim at the act of agreeing renewed every time the parties to the antecedent agreement consciously participated in acts tending to perform it. Thus, as in the *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, the agreement might be legal when made and become illegal by a subsequent statute. The original making could not be punished, but any subsequent concurrence in an act of performance could be treated as a renewal of the agreement and a violation of the statute. In that case, the offense sought to be punished would not be the antecedent agreement, but the renewal or making anew of the agreement, to be established by proof of present acts.

It is sometimes said that the performance of an overt act in pursuance of a conspiracy and tending to effect its object will *toll* the statute of limitations, and that an indictment which avers the commission of the offense of conspiracy prior to the period of limitation and overt acts within the period tending or intended to effect the object of the original conspiracy tolls the statute. This method of reasoning, however, is wholly unsound.

There is no such theory or doctrine in the criminal law as the tolling of a statute limiting prosecutions for crime except as expressly provided for in such statute. One may renew or repeat the crime, but no act short of the commission of the crime can start the statute running anew. It is shown below to be the settled principle of law that overt

acts form no part and constitute no element of the crime of conspiracy. If this be so, the doing of such acts cannot toll the limitation as to past criminal acts, although they may be evidence of the renewal of the crime. Under such a criminal statute as section 1044 of the Revised Statutes, the only act or circumstance that can toll the statute is the absence of the accused as a fugitive from justice (sec. 1045), and the limitation is not even then, strictly speaking, tolled, but the statute does not apply to any such fugitive, and he cannot, therefore, avail of it.

All through the argument of the government—and necessary to uphold it—is the assertion in one form or another that the question is as to the continued existence of the conspiracy, and that this is to be determined not by any present criminal act on the part of the accused, but solely by the antecedent intention or antecedent mutual understanding or the object of the original conspiracy; in other words, the contention is that if the original conspiracy was indefinite as to time, or if the conspirators contemplated a continuing effect or object, then they would remain liable to criminal prosecution indefinitely unless they could show an actual abandonment of their intent (brief U. S. pp. 40–42). Persons would then be punishable, not because they had done any criminal act or had actually committed any criminal offense within the three years, but because their antecedent intention contemplated future acts or consequences or effects. Under this theory, men would be liable criminally for past intentions, or as long as the consequences or effect of the antecedent acts continued to endure. It is submitted that no such doctrine exists in our system of criminal jurispru-

dence. The government fails to cite a single authority to sustain this extraordinary proposition, and we believe it is correct to say that there is no case anywhere which supports this contention of the government. On the contrary, every case where this question has been considered proceeds upon the assumption that, of course, a criminal act must be shown to have been done within the period of the limitation. See particularly *United States* v. *Owen*, 32 Fed. 534; *United States* v. *McCord*, 72 Fed. 159; *United States* v. *Greene*, 100 Fed. 941; *United States* v. *Greene*, 115 Fed. 343; *United States* v. *Greene*, 146 Fed. 803, affirmed in 154 Fed. 401; *Ex parte Black*, 147 Fed. 832; *United States* v. *Black*, 160 Fed. 431; *United States* v. *Bradford*, 148 Fed. 413, affirmed in 152 Fed. 616; *Ware* v. *United States*, 154 Fed. 577, certiorari denied in 207 U. S. 588; *United States* v. *Biggs*, 157 Fed. 264, affirmed in 211 U. S. 507; *United States* v. *Barber*, 157 Fed. 889; *Jones* v. *United States*, 162 Fed. 417, certiorari denied in 212 U. S. 576; *Jones* v. *United States*, 179 Fed. 584; *United States* v. *Breese*, 173 Fed. 402; *Lonabaugh* v. *United States*, 179 Fed. 476; *Lorenz* v. *United States*, 24 App. D. C. 337, certiorari denied in 196 U. S. 640; *Commonwealth* v. *Bartilson*, 85 Pa. St. 482; *Ochs* v. *People*, 25 Ill. App. 379, affirmed in 124 Ill. 399; *Fire Ins. Cos.* v. *State*, 75 Miss. 24; *State* v. *Langdon*, 159 Ind. 377; *State* v. *Mason*, 108 Ind. 48, 53.

It is then further argued by the government, as the necessary corollary of its fundamental proposition, that in conspiracy cases the abandonment of the conspiracy through inaction or affirmative acts, must be shown as a question of fact (brief, p. 42). This argument means

that the continuance of the commission of the crime is to be presumed in the absence of proof to the contrary, thus completely nullifying the presumption of innocence that the law throws around a defendant. *Coffin* v. *United States*, 156 U. S. 432. The next step in the argument seems to be that although abandonment may be inferred through inaction for three years, the statute of limitations should then only begin to run after such three years of inaction, that is to say, that the period of limitation of prosecutions for conspiracy would then be six years from the commission of any criminal act (p. 44).

Indeed, the government in its brief so far commits itself to the doctrine that no act whatever need be shown within the three years that it challenges (p. 45) the soundness of the decisions which hold that an overt act done to effect the object of an antecedent criminal conspiracy may under any circumstances be treated as evidence of a renewal of the offense. Thus, it is said that a so-called overt act cannot itself create a conspiracy, and however wrong in itself, would not support a charge of conspiracy unless following an actual conspiracy (p. 45). If it be meant by this statement that an overt act consciously done to effect the object of an antecedent conspiracy with the participation of one or more of the conspirators may not of itself prove the act of conspiring and thus constitute a renewal of the offense, it is entirely erroneous, as will be plain on the slightest consideration. For example, suppose that a conspiracy has been abandoned; may not the same conspiracy be renewed by the parties through conscious participation in an overt act done to effect the original object? If the conspirators in the case at bar had been

prosecuted for the original offense committed in 1903, could not the same conspiracy be renewed and such renewal be evidenced by acts done to effect the original object?

Let us suppose further that in the case at bar one count in the present indictment had charged the commission of the offense of conspiracy in December, 1903, and another and separate count had charged its renewal in 1907 or 1909, and that such renewal was evidenced by the conscious participation in overt acts to effect the object of the same antecedent original conspiracy. (See *Commonwealth* v. *Bartilson*, *infra*, p. 80.) Would it be argued seriously that this indictment only charged one continuous offense? Could not the defendants be acquitted on the first count because prosecution for the offense committed December 30, 1903, was barred by the statute of limitations, yet, nevertheless, be convicted on the second count, charging the offense in 1907 or 1909, if such count sufficiently charged and the proof showed the renewal of the conspiracy, or, in other words, the commission of the offense in 1907 or 1909? Again, let us suppose that the defendants, having accomplished their alleged purpose of closing the refinery for at least one year, had met in January, 1905, and abandoned their scheme by appropriate acts, and that three years had then elapsed. Of course, prosecution for the original offense would then have been plainly barred even under the government's theory. Suppose, however, that in 1907, the defendants had consciously participated in some acts tending to effect the same object as that of the original conspiracy; in other words, to restrain or monopolize interstate trade

by preventing the Pennsylvania Company from engaging in business. Would any one seriously argue that such overt acts would not be evidence of a renewal of the original conspiracy and sufficient to establish the commission of a new offense?

An examination of all the recent cases in the lower federal courts, involving as they do the consideration by many judges of the question of the limitation as applied to conspiracies, will show that in no instance has it been held or intimated that a conspiracy was a continuous or continuing offense in such a sense that it could continue to be committed or could be presumed to continue without any act done within the three years' limitation. It is true that the crime is sometimes spoken of as continuous, but this is generally coupled with the statement that it may be *renewed* by some affirmative act. In all these cases, except two (*United States* v. *Brace*, 149 Fed. 874; *United States* v. *Raley*, 173 Fed. 159), decided in the district courts, the indictments have charged and the evidence has established the commission of the offense upon a single day within the period of the limitation. All the other cases which have overruled the defense when examined will prove to be wholly consistent with the theory of renewability; and it will be seen that in no case is it held or suggested that the offense of conspiracy can be deemed or presumed to have been committed within the three years limitation without proof of some *act* done during that period.

The indictment in the case at bar was, therefore, fatally defective in not showing the actual commission of the crime of conspiracy within the period of the three years'

limitation prescribed by section 1044 of the Revised Statutes. The Grand Jury, in finding the indictment, must have proceeded upon the theory that if the conspiracy were proved as charged in December, 1903, it was not necessary to show the renewal of that conspiracy within the three years' limitation. If the present indictment stands, and the theory of the government be adopted, then all that will be necessary for conviction will be to prove the acts of the parties in December, 1903, *in engaging in the original conspiracy*, without the proof of a single act since that date, and without any proof that the parties consciously participated in or renewed the conspiracy at any date after July 1, 1906. The accused would then be punished, not for any criminal act done during the period of the limitation, but for acts done nearly six years before the finding of the indictment. Slight reflection must suffice to convince the court that there are grave differences between the proof which would justify an indictment and conviction upon the theory of a continuous crime commenced in 1903 and the proof which would be required to establish that the conspiracy had been renewed or that the accused had conspired anew within the three years. This distinction is one of vital substance in regulating the basis of indictments and trials for alleged conspiracies.

The alleged overt acts of 1907 and 1909 and their insufficiency to show the commission of the crime of conspiracy will be discussed under point IV, p. 84.

III.

CONSPIRACY IS A NON-CONTINUOUS CRIME, AND AN INDICTMENT WHICH CHARGES ITS COMMISSION ON A DATE BARRED BY THE STATUTE OF LIMITATIONS CHARGES AN OUTLAWED OFFENSE AND IS NOT SAVED BY AN ALLEGATION OF ITS CONTINUANCE TO A TIME WITHIN THE LIMITATION.

The indictment in the case at bar charges that the defendants were continuously engaged in the alleged conspiracies from December 30th, 1903, down to and including the date of its finding and presentation, and it is the government's contention that conspiracy is so far and so essentially a continuing offense that a person may be held to answer in conspiracy upon the allegation of its inception and completion at a time however remote coupled with an averment of continuance, and without allegation of any subsequent act of conspiring. It is submitted by the defendants that this contention of the government is unsound and that conspiracy is not continuing offense, but an offense which, like an attempt to commit a crime, and like many substantive crimes, is subject to renewal.

It is settled that, as to crimes which are not essentially continuous, the statute of limitations begins to run as against each renewal of the crime upon the commission of the act which constitutes the gist of the offense, and that where an indictment charges such an offense as continuing, that allegation will be disregarded as surplusage and the indictment construed to charge the crime only at the earliest date at which it avers the crime to have been completed. Thus, in *United States* v. *Irvine*, 98 U. S. 450, the indictment charged that on the 24th of Decem-

ber, 1870, the defendant wrongfully withheld the amount of a pension, "and continuously withheld it until the time of the finding of the indictment" in September, 1875. The court below held that the indictment charged a "continuous" crime, but this court reversed the ruling and held that a plea of the statute of limitations should have been sustained, Mr. Justice Miller speaking for the court as follows (p. 451):

> "It is not very easy to define for all purposes what constitutes under the statute a withholding of the pension. It cannot commence, of course, until the money is received by the party charged. Nor can it commence then, unless there is a duty of immediate payment to the pensioner. A reasonable time must certainly be allowed for this. What that is must depend in each case on its own circumstances. . . . In short, there must be such unreasonable delay, some refusal to pay on demand, or some such intent to keep the money wrongfully from the pensioner, as would constitute an unlawful withholding in the meaning of the law.
>
> "But whatever this may be which constitutes the criminal act of withholding, it is a thing which must be capable of proof to a jury, and which, when it once exists, renders the party liable to indictment.
>
> "There is in this but one offense. When it is committed, the party is guilty and is subject to criminal prosecution, and from that time, also, the Statute of Limitations applicable to the offense begins to run."
>
> "It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when perhaps the pensioner is dead; but the fact of his receipt of the money is matter of record in the pension office
>
> "He pleads the statute of two years, a statute which was made for such a case as this; but the reply is, You received the money. You have continued to withhold it these twenty years; every year, every

month, every day, was a withholding, within the meaning of the statute.

"We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution."

It is also the settled rule that where an indictment charges a crime which is not essentially continuous with a *continuando*, the *continuando* may be disregarded and the indictment treated as charging no more than the commission of the offense on the first day. Wharton's Crim. Pl. & Pr., 9th ed., sec. 125; Bishop's New Crim. Proc., vol. 1, sec. 388; Starkey's Crim. Pl., 1st Amer. Ed., pp. 60, 61; *King* v. *Dixon*, 10 Mod. 335, 337; *United States* v. *La Coste*, 2 Mason 129 (Story, J.); *People* v. *Adams*, 17 Wend. 475, 476 (Nelson, J.); *Wells* v. *Commonwealth*, 12 Gray 326; *State* v. *Nichols*, 58 N. H. 41; *Cook* v. *State*, 11 Ga. 53, 56; *State* v. *Briggs*, 68 Ia. 416; *State* v. *Thompson*, 31 Utah 228; *State* v. *Jasper*, 15 N. C. 323.

Wharton lays down the rule as follows (sec. 125):

"To aver that the defendant, on divers days, committed an offense, is bad; and so where two distinct days are averred; but it is sufficient to state that on a day specified, as well as on certain other days, he kept a gaming house, a tippling house or a common nuisance; the allegation, 'certain other days,' being rejected as surplusage. . . .

"The *continuando*, if unnecessary, may be rejected as surplusage."

Bishop's statement is as follows (sec. 388):

"Where the pleader, intending to employ the *continuando*, sets down a day certain and adds words

> insufficient as such, they will be rejected as surplusage, and the indictment sustained as charging the offense on the single day. Thus, the keeping of a common gaming-house may be, and be alleged as, committed continuously on more days than one; then, if the indictment charges it as done on a day certain, and adds, what is inadequate as a *continuando*, . . . it will be good for the day particularized, though more days might have been laid."

In the recent case of *State* v. *Thompson*, 31 Utah 228, 231, 232, the information, which alleged the commission of the crime of adultery "on the 13th day of February, 1905, and on divers other days and thence continually between the said 13th day of February, 1905, until the 1st day of August, 1905," was challenged for duplicity. The court held that this objection was not well taken, saying:

> "The allegation that the offense was committed on a certain day and thence continually between certain days, charges but one offense, because the day of another offense committed is not sufficiently specified. Each act of adultery constitutes a separate offense. Adultery is not a continuous offense. A *continuando* is not necessary unless for an essentially continuous offense. When an information sufficiently charges an offense not essentially continuous, committed on a specified day and year with an unnecessary *continuando*, the *continuando* does not injure the information, but may be rejected as surplusage."

In *United States* v. *La Coste*, 2 Mason 129, 140, the indictment charged the crime to have been committed "on the 3rd day of January, now last passed, and on divers days and times before and since the last-mentioned day, and after the said 20th day of April, 1818" (p. 139). The Circuit Court, by Mr. Justice Story, held that this did not vitiate the indictment, saying:

> "As to the other objection, that the offense is

> stated to have been committed on divers days and times, it is sufficient to say, that as the offense is alleged to have been committed also on a day certain, if it be but a single offense, the words, 'on divers days and times' may be rejected as insensible and surplusage: if the offense might have been committed on divers days and times, the allegation in this respect is too uncertain to warrant a judgment for such times; but this does not prevent a judgment for one offense which is stated to be committed on a day certain. Either way, then, the objection is not fatal. Hawkins puts an analogous case; if an indictment charged a man with having done a nuisance such a day and year, &c. and *on divers other days*, it is void only as to the facts on those days, which are uncertainly alleged, and effectual for the nuisance on the day specified. So in King *v.* Dixon the indictment charged, that they on such a day, and on divers other days and times, &c. as well before as after, kept a common gambling table. On demurrer, the Court held, that the time was uncertain as to all but one day, and that judgment could only be given for a single penalty."

In *People* v. *Adams*, 17 Wend. 475, it was charged as to the defendant that on the 1st day of June, 1836, and on divers other days and times between that day and the day of the finding of the indictment, to wit, the 12th of September, 1836, he sold liquors without a license. The sufficiency of the allegation of time having been challenged, the court, by Nelson, C. J., held as follows (p. 476):

> "As to time, the count, I think, is sufficiently certain, a day being mentioned; the *continuando* may be rejected as surplusage. Sergeant Hawkins says, (b. 2, ch. 25, Sec. 82), that if an indictment charged a man with having done such a nuisance on such a day and year, &c. and *on divers other days*, it is void only as to the facts on those days which are uncertainly alleged, and effectual for the nuisance on the day specified."

In *Wells* v. *The Commonwealth*, 12 Gray 326, 328, the indictment charged the keeping of a house of ill-fame on the 1st day of December in the year 1857 and on divers other days and times between said 1st day of December and the 1st day of June, 1858. The court laid down the rule as follows:

> "It is an indictment for a nuisance, which is an offense that may have continuance, and may therefore be laid with a *continuando*, and the general rule is well established, that when an offense, which may have continuance, is alleged to have been committed on a day certain and on divers other days which are uncertainly alleged, the indictment is effectual for the act alleged on the day certain, and void only as to the act alleged on the other days."

Thus, it is clear that if a non-continuing offense be pleaded with a *continuando*, the *continuando* will be rejected, and the indictment treated as alleging in legal effect nothing more than the commission of the offense upon the first day laid; and hence if conspiracy is a non-continuing offense, it is clear that the indictment now before the court charges only an offense committed on the 30th of December, 1903.

The most persuasive substantiation of the proposition that conspiracy is not a continuing offense is to be found in the fact that throughout the history of the criminal law, until the most recent times, no case has been found in which an indictment charging conspiracy as a continuing offense has been sustained, and but few have been found in which it was attempted so to be charged, and that the one or two exceptions to that rule have been decisions of courts at *nisi prius* which are

readily to be explained by a confusion of ideas between the requirements of pleading and proof.

An analysis of the nature of the crime of conspiracy will readily show the soundness of the proposition that the offense is non-continuing since the essential element of the offense is the act of confederating or plotting, which is inherently a non-continuing act, and not acts which may be done in pursuance of the conspiracy or to effect its object. And that this is especially clear under the Sherman Act. In this respect, the statute differs from conspiracies under section 5440 of the Revised Statutes, which requires an overt act to complete the offense. There can be no doubt that at common law and under the Sherman Act, the offense of conspiracy is complete, and hence the crime is actually *committed*, when the design or intent is followed by the act of agreeing or confederating, and that it is the bare act of agreeing alone that constitutes the crime. In other words, when two or more agree to carry an unlawful design into effect, the very agreement or plot is an act in itself. This is conceded by the government, for it says in its brief at p. 51:

> "The Sherman Act makes a conspiracy in restraint of commerce or to monoplize commerce an offense without the occurrence of a single overt act."

In Archbold's Criminal Pleading, 22d ed., p. 1209, the author says:

> "Conspiracy is an indictable misdemeanor, consisting in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect the very plot is an act itself, and the act of each of the parties, promise against promise, *actus*

> *contra actum*, capable of being enforced if lawful, is punishable if for a criminal object or the use of criminal means."

See also Bishop's New Crim. Law, vol. II, secs. 171, 172.

And all authorities concur in this view.

In *United States* v. *Hirsch*, 100 U. S. 33, 34, the court said, of a conspiracy charged under section 5440 of the Revised Statutes:

> "The *gravamen* of the offense here is the conspiracy. For this there must be more than one person engaged. Although by the statute something more than the common-law definition of a conspiracy is necessary to complete the offense, to wit, some act done to effect the object of the conspiracy, it remains true that *the combination of minds in an unlawful purpose is the foundation of the offence, and that a party who did not join in the previous conspiracy cannot, under this section, be convicted on the overt act.*"

In *United States* v. *Britton*, 108 U. S. 199, 204, also arising under section 5440 of the Revised Statutes, the court said:

> "The offence charged in the counts of this indictment is a conspiracy. This offence does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiæ*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. *Reg.* v. *King*, 7 Q. B. 782; *Commonwealth* v. *Shedd*, 7 Cush. 514."

And these definitions of the crime have been uniformly

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followed and approved by the court. *Pettibone* v. *United States*, 148 U. S. 197, 202; *Dealy* v. *United States*, 152 U. S. 539, 547; *Bannon* v. *United States*, 156 U. S. 464, 468. In *Williamson* v. *United States*, 207 U. S. 425, 447, Mr. Justice White said:

> "The conspiracy is the offense which the statute defines without reference to whether the crime which the conspirators have conspired to commit is consummated."

In *United States* v. *Donau*, 11 Blatchf. 168, 169, Judge Benedict said:

> "The offense of conspiracy is committed when, to the intention to conspire, is added the actual agreement; and this intent to conspire, coupled with the *act of conspiring*, completes the offense intended to be created by the statute, notwithstanding the requirement that the prosecution show, by some act of some one of the conspirators, that the agreement went into actual operation."

In *State* v. *Buchanan*, 5 H. & J. (Md.) 317, 355, it is declared that

> "There is nothing in the objection that to punish a conspiracy where the end is not accomplished, would be to punish a mere unexecuted intention. It is not the bare intention that the law punishes, but the *act of conspiring*, which is made a substantive offense, by the nature of the object intended to be effected."

And in *People* v. *Mather*, 4 Wend. 229, 264, Marcy, J., said, in speaking of conspiracy:

> "It is not a mental offense; it does not consist in intents and imaginations. It exists where there are no overt acts *other than the agreement.*"

As the House of Lord said in *O'Connell* v. *The Queen*, 11 C. & F. 155, 233:

> "It has accordingly been always held to be the

law, that the gist of the offense of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not."

In *Mulcahy* v. *Reg.*, L. R. 3 H. L. Cas. 306, 317, the court said:

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, *the very plot is an act in itself*."

In *Commonwealth* v. *Judd*, 2 Mass. 329, 337, Chief Justice Parsons used the following language:

"The Court are satisfied that the gist of a conspiracy is the unlawful confederacy to do an unlawful act, or even a lawful act for unlawful purposes; that the offence is complete when the confederacy is made, and any act done in pursuance of it is no constituent part of the offence, but merely an aggravation of it."

In *People v. Flack*, 125 N. Y. 324, 332, it is said:

"The gist of the crime of conspiracy consists in a corrupt agreement between two or more individuals to do an unlawful act, unlawful either as a means or as an end. (Bishop's Cr. Law, § 171, *et seq.* and cases cited.) The agreement may be established by direct proof or by inference, as a deduction from conduct which discloses a common design on the part of persons charged to act together for the accomplishment of the unlawful purpose. At common law the crime of conspiracy was complete when a corrupt agreement was made, although not followed by any overt act and no step had been taken in furtherance of the object of conspiracy."

The rule that the offense consists solely of the act of conspiring and not of the overt acts done in pursuance of

the conspiracy does not, of course, exclude proof of overt acts. They are admissible and ordinarily essential as evidence from which the fact of antecedent agreement may be inferred and the nature or character of the conspiracy determined, or they may with other proof tend to establish the renewal or repetition of the offense. They would, however, be immaterial if the fact of conspiring were otherwise conclusively proved or were admitted as by demurrer.

These authoritative pronouncements as to the nature of the crime of conspiracy and as to the act that constitutes the essential element of the offense are incompatible with the theory that it is a continuous crime. This will become manifest upon a consideration of the criterion whereby continuing and non-continuing offenses are distinguished.

A continuing offense is one in which the act or acts constituting the essential element of the offense must necessarily continue in an uninterrupted course of performance throughout a period of time more or less protracted. It necessarily contemplates duration of time as an essential and indispensable element of the definition of the crime. And it consists generally of a state or condition maintained or continued by acts. Such an offense is subject to prosecution at any time during the maintenance of the state or condition, but only one prosecution will lie for the entire period, for there has been but one offense. A non-continuing crime is one in which the act that constitutes the offense is performed *uno ictu;* and a crime of this character, even when described by statute in terms that indicate continuance, must be prosecuted as of the day when that act was performed and the crime thus

completed. *United States* v. *Irvine*, 98 U. S. 450, 452. But many crimes, which are non-continuous, are by their nature subject to renewal, and in such case, each renewal of the act constituting the gravamen of the offense constitutes a new crime. Thus, successive burglaries might be committed by the same person upon the same premises; successive briberies of the same official to commit the same acts of malfeasance or misfeasance; or successive attempts by the same person in the same manner to commit almost any offense.

The true criterion of continuity is to be found in the nature of the act or condition which constitutes the essence of the offense, as distinguished from the purpose that animates it, or the results, consequences or effects that flow from it. This is illustrated by the decision of this court in *Armour Packing Co.* v. *United States*, 209 U. S. 56, read in connection with the decision of the Circuit Court of Appeals, Sixth Circuit, in *Davis* v. *United States*, 104 Fed. 136, which is therein distinguished. The question in both cases was as to the *locus* of the alleged offense for the purpose of determining the district in which the accused could be tried under section 2 of Article III of the Constitution and under the Sixth Amendment. In the *Armour* case, the indictment charged an offense under the Elkins Act of February 19, 1903, 32 Stat. 847, in accepting or receiving a rebate whereby property was transported in interstate commerce at a lower rate than that named in the tariffs published and filed by the carrier. In the *Davis* case the prosecution was under the act of March 2, 1889, 25 Stat. 858, for false billing of merchandise to be transported in interstate commerce.

In each instance, the merchandise had been actually transported; in each instance, it was obviously the intention of those who procured it to be transported that it should reach its destination, and in each instance their intention manifestly persisted or was continuous throughout the whole period of the transportation. Each prosecution, therefore, presented a case in which the result of the criminal act endured at least throughout the period of transportation. In the *Armour* case, it was held that the offense which was being prosecuted was a continuing offense, and that it might be prosecuted in any district through which the transportation took place as of the time of the transportation in that district, because the statute under which the prosecution was instituted made the actual transportation of the merchandise one of the essential elements of the crime, and, therefore, so long as the transportation was in progress one of the acts constituting the crime was being committed. In the *Davis* case, however, it was held that the actual transportation did not constitute one of the essential elements of the crime, and hence that the crime was not continued in course of commission throughout the period of transportation and in the districts where the transportation took place, and that a prosecution would not lie in a district where that was the only act done. Mr. Justice Day delivered the opinion of the Circuit Court of Appeals of the Sixth Circuit in the *Davis* case, and subsequently delivered the opinion of this court in the *Armour* case.

The soundness of the view that it is the nature of the act constituting the offense that determines its continuous or non-continuous nature will be rendered more

apparent by a consideration of the crimes that have been held to be continuous as distinguished from those held to be non-continuous, or merely subject to renewal. Thus, erecting a nuisance is a non-continuous offense, but maintaining it is a continuing one. *State* v. *Poyner*, 134 N. C. 609. It cannot be doubted that if a nuisance were to be erected and then destroyed, and next day restored, each restoration would constitute a separate offense; while if it were maintained without interval, there would only be a single offense throughout the entire period of maintenance. Wharton's Crim. Law, 10th ed., vol. I, sec. 27. Again, where gambling constitutes an offense, every waging contract is a separate crime, but if the offense be keeping a gambling house, the crime is single for the entire period of its continuance up to the time of the finding of an indictment. *State* v. *Prescott*, 33 N. H. 212, 214. The same distinction is applied to the crime of adultery (*State* v. *Thompson*, 31 Utah 228, 231; *State* v. *Briggs*, 68 Ia. 416, 419; *Matter of Neilsen*, 131 U. S. 176), as distinguished from unlawful cohabitation. *In re Snow*, 120 U. S. 274. The former consists of a single act, and the latter of the maintaining of a status. So, of somewhat similar crimes, such as bigamy, which is a crime committed *uno ictu*, since the act which constitutes the criminal offense is the act of marrying, and neither the continuance of the marital relation, nor the consummation of the marriage is essential to it. *Gise* v. *Commonwealth*, 31 P. F. Smith (Pa.) 428. So, of rape or incest (*Cook* v. *State*, 11 Ga. 53, 56), where the repetition of the acts with the same individual constitute separate offenses. *People* v. *Flaherty*, 162 N. Y. 532, 538.

If a crime could be rendered continuing without continuity of action, solely through the presumed persistence of intent or the persistence of the result, and if an offense whereof every essential act had been committed prior to the statutory period were subject to prosecution after that period, there would be presented an instance where one who had secured amnesty by lapse of time for every criminal act which he had ever committed was nevertheless subject to prosecution on the basis of his intent alone, evidenced and to be established wholly by precedent acts.

These principles are not affected in their general application by the fact that the act constituting the crime is the making of a contract which contemplates future acts, for it is unquestioned that the gravamen of the offense in bigamy is the making of the contract of marriage, and that in bribery it is the making of the agreement to affect official action. In bribery, the offense consists in the corrupt agreement to procure an act of official malfeasance, and neither the payment of the consideration by the one party nor the performance of the corrupt compact by the other is essential to or an integral part of the offense. The intent which animates the act of agreeing, in bribery, ordinarily persists up to and including the time when the corrupt compact is to be performed, and oftentimes it results in the performance of that compact. But it has never been contended that in bribery the statute of limitations ran from any date other than that at which the corrupt bargain was struck, or that it could be prosecuted as an offense which continued from the time the bargain was made until the time for the performance of the corrupt act had arrived. On the other

hand, it cannot be doubted that each new agreement whereby it was sought to procure the official to do a corrupt act would constitute a new offense and that this would be rendered no less true by reason of the fact that there had been prior agreements to the same end between the same parties. So, in bigamy, the status created by the corrupt contract of marriage continues, and ordinarily the intent that animates the offense is continuous, but the crime is concededly non-continuous. In each instance, both the intent and the results endure, but that does not change the essential nature of the crime and render it continuous.

The application of this principle to conspiracy is made especially emphatic by the unbroken line of authorities which establish in the most positive manner that the results which flow from conspiracy, *i. e.*, the acts done in pursuance of it, form no part of the offense; for, as has been already pointed out, it is not only settled that the acts done in furtherance of the crime are no part of the crime itself, and that their performance is immaterial to the criminality under the conspiracy, but a compact which does not contain within itself all the elements of wrong will not be rendered indictable by the criminality of acts done in furtherance of it. *United States* v. *Britton*, 108 U. S. 199, 205; *McKenna* v. *United States*, 127 Fed. 88, 90; *Salla* v. *United States*, 104 Fed. 544, 545; *Conrad* v. *United States*, 127 Fed. 798; 801. Indeed, the acts done pursuant to a conspiracy, and in furtherance of it, are so far from being a part of the offense that if they be criminal they constitute separate crimes, and a conviction or acquittal on either the conspiracy or the separate crime is no bar to a prosecution

for the other offense. *Berkowitz* v. *United States*, 93 Fed. 452, 457; *Davis* v. *People*, 22 Colo. 1, 3; *State* v. *Sias*, 17 N. H. 558; *Bailey* v. *State*, 42 Tex. Criminal Rep. 289, 291; *Whitford* v. *State*, 24 Tex. Court of App. Rep. 489, 493; *Wallace* v. *State*, 41 Fla. 547, 557; *Wilcox* v. *United States*, 103 S. W. 774, 776.

Manifestly, these principles are incompatible with the theory that conspiracy is rendered continuing through its results; for it is one of the attributes of a continuing crime that all the acts which enter into it form but a single offense, and that that offense embraces all acts which enter into the commission of the crime throughout its entire period of performance. Thus, in *Matter of Neilsen*, 131 U. S. 176, 186, it was held by this court that a conviction for the offense of unlawful cohabitation during a given period was a bar to a prosecution for an act of adultery committed with one of the parties to the cohabitation during the same period, though adultery constituted a separate crime. And this decision was based upon the ground that cohabitation was a continuous offense and that as such it necessarily embraced within itself all acts performed in the course of its criminality. *Converso*, therefore, an offense which does not embrace within itself the acts which result from it, cannot be held to be rendered continuous by reason of the performance of those acts.

These principles are entirely in accord, however, with the theory that a conspiracy is a renewable offense, and that it is renewed whenever two or more persons animated by a corrupt intent consciously participate in any act in furtherance of that intent. And it follows from these principles that while those who enter upon a con-

spiracy may secure immunity for their criminal acts after a lapse of three years if they do nothing further within the three years, those who persist in their original purpose and seek by co-operative action to carry it into effect incur a liability each time they co-operate; in other words, each time they commit the offense of conspiring. The subsequent acts may be sufficient, in connection with what has preceded them, to establish a renewal of the conspiracy; and for these acts *those who are proved consciously to have participated in them* may be held for the renewal of the conspiracy. But it does not follow from these principles, nor is it consistent with them, that the mere performance of an act by some individual relating remotely to or connected with an agreement which he had previously entered into with others, of itself suffices to constitute a renewal of the conspiracy as to all. The evil at which the law of conspiracy is aimed is that which flows from concerted action, and conspiracy itself inevitably involves the idea of concerted action. A conspiracy which was committed or was established or was renewed by the unaided act of a *single individual* would be a contradiction in terms. Nor is it consistent with these principles that each overt act performed by any one or more persons in furtherance of the same object as that of a pre-existing conspiracy suffices to renew the conspiracy as to *all* who had originally participated in it. This would be abhorrent to the principle of natural justice which forbids that crime shall be imputed to an individual save upon the basis of acts to which he has contributed, and could be founded only upon the theory that, as to the individual who did

not participate in the performance of the act, the crime consisted in the persistence of his original intent.

This view of the nature of conspiracy is the only one which is consistent both with principles of justice and with the necessity of such effective enforcement of law as will tend to check and prevent the evil which the law of conspiracy is designed to remedy. Under the theory that conspiracy is a continuing offense, one who has entered into a conspiracy, it may be twenty years ago, is either presumed to be continuing in crime by reason of the terms of the criminal compact or of the intent which animated it, and is thus held to be committing a crime at a time when he is doing no criminal act whatever; or he is held to be guilty of a crime whose essence is concurrent activity or conscious participation at a time when he is guilty of no such activity or participation, and the crime is therefore, to be imputed to him solely by virtue of the activity or participation of some other person. Moreover, the policy of the criminal law is to deter and prevent crimes and mischief. It would necessarily result from the theory that conspiracy is a continuous crime, that one who had once embarked upon a conspiracy would have every incentive to continue in his criminal course and no incentive to desist or abstain therefrom; since by embarking upon the conspiracy he had subjected himself to the full penalty, and since by continuing in it he could subject himself to no greater liability. *Matter of Neilsen*, 131 U. S. 176; *In re Snow*, 120 U. S. 274. Surely, if such a conclusion were now to be announced as law, it would tend to minimize the effectiveness of the statutes against conspiracies, and would supply every inducement to the

continuance of attempts to effect the illegal purposes and no inducement to the abandonment of such purposes.

The theory that the crime of conspiracy is not continuing eliminates these absurdities, and substitutes a body of doctrine which produces results that are at once just and effective. Under that theory, he who engages in a conspiracy is held for the act of conspiring. If he ceases after the first act, he acquires amnesty after three years. No activities other than his own can prolong the duration of his individual guilt and criminal responsibility and no act but his own, i. e., his agreement, concert, or conscious participation, imposes responsibility upon him. If, on the other hand, he persists in the forbidden purpose and joins with others in furtherance thereof, he incurs a new responsibility for such new activity; and thus to each offender there is meted out a punishment commensurate with his own offending.

It is the failure to appreciate the soundness of these propositions that has wrought such confusion as is occasionally to be found in the literature of the subject. From a realization of the practical necessity that conspiracies should be subjected to punishment as long as the evil involved in them persisted, there has resulted a disposition to strain legal principles in order to find a basis for criminality other than the original act of agreeing; and it has not been appreciated that that necessity would be adequately met and a remedy precisely commensurate with the evil would be supplied by the indictability of each new act of agreeing. Consequently, there has arisen a tendency to take refuge in the theory that a conspiracy was rendered continuous by reason of the presumed per-

sistence of the intent—a concept which flies in the face of fundamental legal principles; or by reason of the continuing character of the activities which were designed to flow from the act—a concept which flies in the face of the fundamental principles of the law of conspiracy, that it is the conspiracy and not that which flows from it that constitutes the offense. In one aspect the mere intent would be punished; and in the other aspect, the overt act alone would be made the test of the crime of conspiracy.

All the well considered cases will be found to have been decided upon the theory that the offense is renewable and not continuing.

In *Ware* v. *United States*, 154 Fed. 577, (certiorari denied in 207 U. S. 588), decided by the Circuit Court of Appeals, Eighth Circuit, the indictment was for conspiracy to defraud the United States of the title and possession of lands by means of fraudulent entries under the Homestead Laws, and each count of the indictment charged a conspiracy formed *within three years* of the filing of the indictment, and an overt act thereunder. The offense was thus charged to have been actually committed within the limitation. The evidence showed that the conspiracy had been originally formed and that an overt act in pursuance thereof had been performed prior to the period of three years. By reason of this fact, it was claimed that the offense was barred by section 1044 of the Revised Statutes, the argument being that as the crime was completed when the conspiracy was first formed and the overt act done, it could not be revived so as to affect the bar of the

statute of limitations by any subsequent act on the part of the conspirators. The court held that this proposition was unsound, and that a conspiracy, like any other crime, could be renewed by the performance of all the acts essential to its commission within the period of the statute of limitations, no matter how long before that period the same acts had previously been done.

Sanborn, C. J., speaking for the court, said (pp. 579, 580):

> "After a careful reading and consideration of these and other authorities, our conclusions are that the true answer to this question is that the existence of the conspiracy and the *conscious participation* of the defendant therein with the three years are indispensable to the maintenance of such a prosecution; but that, if these facts are established by competent evidence, such a prosecution may be sustained. Proof of the formation by the defendant and others, more than three years before the indictment, of such a conspiracy as that charged in the indictment under which an overt act has been done prior to the three years, is insufficient to sustain the charge of a conspiracy within the three years. But in connection with evidence aliunde of the existence of the same conspiracy, and of the *defendant's conscious participation therein within the three years*, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment. An overt act committed by one of the alleged conspirators within the three years pursuant to a conspiracy between him and the defendant, formed and followed by an overt act more than three years prior to the filing of the indictment without the defendant's consent or agreement within the three years to the continued existence and to the execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years. . . . .
>
> "The same rules of law and of evidence govern the trial and the decision of the issue whether or not

the defendant jointly with others consented or agreed within the three years to the existence of the conspiracy and the subsequent execution of its scheme which control the trial of the issue whether or not the conspiracy was originally formed, where that is the crucial question. *Evidence must be produced from which a jury may reasonably infer the joint assent of the minds of the defendants and of one or more other persons within the three years* to the existence and the prosecution of the unlawful enterprise. Until such evidence is produced, the acts and admissions of one of the alleged conspirators are not admissible against any of the others unless the court in its discretion permits their introduction out of their order. But where evidence has been produced from which the joint assent of the defendant and one or more other persons *within the three years* to the existence and execution of the conspiracy may reasonably be inferred by the jury, then any subsequent act or declaration of one of the parties in reference to the common object which forms a part of the *res gestæ*, may be given in evidence against one of the others who has consented to the enterprise. And the joint assent of the minds of a defendant and others *within the three years* to the existence and execution of the conspiracy may be found by the jury like any other ultimate fact as an inference from other facts proved. Drake *v.* Stewart, 22 C. C. A. 104, 107; 76 Fed. 140, 143."

Obviously, the theory which underlies this decision is that conspiracy is not a continuing crime and is not an offense which flows uninterruptedly from the original formation of the agreement until the object of the agreement is consummated; but that it is a crime which is committed only by the joint assent which is its essence, and accordingly that the act of conspiring must be established as of the date on which the conspiracy is laid in order to justify a prosecution as of that date. In other words, the *ratio decidendi* is that the renewal of the conspiracy

must be established within the limitation and that a prosecution will not lie upon mere proof of the old offense committed prior to the running of the statute. This case is a clear authority in support of the defendants' contention that conscious participation or joint assent must be alleged and proved within the three years.

Nearly all the other federal cases which deal with the statute of limitations in its application to conspiracy proceed upon the same theory, though some of the decisions, which are based in fact upon the theory that a new conspiracy had been formed, are accompanied by opinions in which the crime is spoken of interchangeably as continuous or renewable.

Thus, in *United States* v. *Jones*, 162 Fed. 417, decided by the Circuit Court of Appeals of the Ninth Circuit, the indictment charged a conspiracy *formed on the third day of September, 1902*, which was just within the three years' limitation, but there was evidence showing the original formation of the conspiracy in 1900 and overt acts both before and within the three year period. The contention of the defendants was that urged in the *Ware* case. The court approved of the doctrine of the *Ware* case, and in the course of its opinion said (p. 427):

> "It was a continuing conspiracy, and so long as conspirators continued in pursuance of it, and did not avail themselves of the *locus penitentiæ* that section 5440 of the Revised Statutes afforded them, *every overt act committed by any party to the conspiracy gave new effect to the conspiracy and constituted another crime.* Such we understand to be the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of Ware *v.* U. S. 154 Fed. 577."

Manifestly, there is here a contradiction in terms. If the conspiracy were one continuous crime, the "renewal" could not possibly constitute a new crime, for it is elementary that a continuing crime is a single offense no matter how long may be its duration. *In re Snow*, 120 U. S. 274; *Matter of Neilsen*, 131 U. S. 176. That the case was presented and decided upon the theory of renewal and not of continuance is made manifest from the indictment which charged, not a conspiracy formed prior to the statutory period and continued within it, but a conspiracy formed within the statutory period, that is, a new conspiracy.

In the subsequent case of *Jones* v. *United States*, 179 Fed. 584, 610, also decided by the Circuit Court of Appeals for the Ninth Circuit, the indictment charged the crime to have been committed within three years prior to the finding of the indictment, and the court simply followed the doctrine which it had laid down in *Jones* v. *United States*, 162 Fed. 417.

This view of the renewability of the crime of conspiracy was declared to be the law of the federal jurisdiction in *United States* v. *Biggs*, 157 Fed. 264. In this case, the indictment charged that the defendants

> "On the twenty-fifth day of August in the year eighteen hundred and ninety-nine, and at the several times of the committing of the several overt acts hereinafter in this indictment mentioned, and continuously at all times between the said twenty-fifth day of August in the year last aforesaid and the day of the presenting of this indictment, unlawfully did conspire, etc." (p. 264).

It further charged the commission of a number of overt acts some of which were within the period of three years. The court held that the indictment must either be regarded

as charging a conspiracy formed on the 25th day of August, 1899, and therefore a conspiracy barred by the statute of limitations; or as charging a number of separate conspiracies entered into from time to time and therefore multifarious. In this case an appeal was taken to this court by the government, under the act of 1907, but the court, having decided that the demurrer was rightly sustained upon another point, refused to pass upon the questions arising under the statute of limitations and declined to express any opinion with regard to them. 211 U. S. 507, 522.

In *United States* v. *Bradford*, 148 Fed. 413, affirmed on the opinion below, 152 Fed. 616, the formation of the conspiracy was laid as *within the statute of limitations*, and the same question that was involved in the two cases last discussed was considered by the court and decided in the same way. The opinion discloses the same interesting confusion between renewal and continuance and the same contradiction in terms as that in the *Jones* case. Thus the court says arguendo at one place (p. 417):

> "That immunity from prosecution for the conspiracy would result from the lapse of three years after the commission of the first overt act, although the conspiracy were thereafter *continued* or *repeatedly renewed*, and many other overt acts committed under it, . . . is an utterly irrational conclusion, which the law could never have contemplated;"

and thus shows that continuance and renewal were to it practically interchangeable terms. Then follows reasoning which shows that the court was dealing with conspiracy as a renewable offense (p. 418):

> "What difference, so far as regards the statute of limitations, is there in principle between the condition

> just stated and the proposition that there may be as many prosecutions as there are overt acts, *when the same conspiracy is renewed as each different overt act is committed?* The conspiracy C, plus overt act A, create a criminal condition, for which the government can prosecute under the terms of Rev. St. §5440, during three years from the date of overt act A. *The same conspiracy C, or any other conspiracy, plus overt act B, create another and a different criminal condition, for which the government can prosecute during three years from the date of overt act B. And so on.*"

The basis for this view is disclosed later on in the opinion by this statement (p. 419):

> "It is well and fully settled that the commission of an overt act is, per se, a renewal of the conspiracy."

In the case of *United States* v. *Greene*, 115 Fed. 343, 349, 350, affirmed 154 Fed. 401, the indictment charged the conspiracy as having been entered into in 1897, which was within the period of the statute of limitations. There were allegations of matters of inducement showing that the scheme had been formed prior to 1897 and had been in course of execution, but the only conspiracy actually *charged* was alleged as of the first of January 1897. The court on analysis of the indictment found that it was not duplicitous and that prosecution was not barred by the statute of limitations. Its view of the nature of the crime is indicated by the following:

> "Yet if, within the period of effective prosecution before the date of the indictment, *joint action* was taken by the alleged conspirators, or by two of them, in pursuance of the general scheme, *eo instanti* the tenacious grasp of the law seized upon the parties, and courts will proceed to lay bare from its inception every incident of the conspiracy."

The insistence upon the necessity of "joint action" within the period of limitation was certainly inconsistent with the idea of the continuance of the conspiracy and consistent only with the renewable theory. That the court was proceeding upon the renewable theory is made manifest by the charge to the jury in the same case, reported in 146 Fed. 803, 888, from which we quote as follows:

> "The several conspiracy counts in indictments Nos. 322 and 371 charge that the defendants on trial and the alleged co-conspirators confederated and agreed together on or about January 1, 1897, to defraud the government in the manner set out in the several counts of the said indictments. Some evidence has been submitted on the part of the United States tending to show that there was a new meeting of minds on or about January 1, 1897.... If the jury believe from the evidence that a corrupt scheme to defraud, such as is averred in the conspiracy counts of the indictments, had been in operation by and between the defendants for several years, and that there was a *new meeting of minds* between the said defendants to the indictments on or about January 1, 1897, looking to the fraudulent execution of the work under these 1896 contracts, they might infer that there was a *renewal* of the conspiracy on or about January 1, 1897."

In *Lorenz* v. *United States*, 24 App. D. C. 337, 387 (certiorari denied, 196 U. S. 640), the offense was charged as having been committed *on a date within the statute of limitations*, and the indictment charged the formation of the conspiracy within three years. The court charged the jury (p. 387):

> "The jury are instructed that, in order to warrant a verdict of conviction, it is not necessary for the government to show, or for the jury to find, that the several conspiracies charged in the indictment, or any

of them, were entered into upon the particular dates mentioned in the indictment. It is sufficient if it appear that the conspiracies alleged were entered into at any time within the period of three years before the filing of the indictment,—that is to say at any time within three years prior to the 22d day of June, in the year 1903. The fact, therefore, if you find it to be a fact, that the conspiracies charged in certain of the counts were not, or could not have been, entered into on the days on which they are charged, should not prevent your finding a verdict of guilty upon those counts if you find they were entered into at some other time or times within three years prior to the said twenty-second day of June, 1903.

"Undoubtedly, as argued, the conspiracy is the gist of the offense defined in Section 5440, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3676), though it is not indictable until some act shall have been done by one or more of the conspirators to effect the object of the corrupt agreement. The offense is then complete as to that act, and the statute at once begins to run; but it does not follow that all similar acts thereafter may be committed with impunity. Through the repetition of such acts—overt acts, as they are commonly called—the conspiracy is made a continuing offense. *By each subsequent act it is repeated and entered into anew.* People *v.* Mather, 4 Wend. 259; 21 Am. D. C. 122; Com. *v.* Bartilson, 85 Pa. 482, 489; Fire Insurance Cos. *v.* State, 75 Miss. 24, 35, 225 So. 99; Ochs *v.* People, 25 Ill. App. 379, 414, 124, Ill. 399, 426, 16 N. E. 662; United States *v.* Greene, 115 Fed. 343."

In *Arnold* v. *Weil*, 157 Fed. 429, 430, a removal proceeding, the indictment charged a conspiracy formed in Colorado. The proof before the commissioner established the original inception and "its renewal by overt acts" in Colorado. The court held that a removal should be ordered, saying:

"Surely it does not require any great stretch of

logical principle to say that the conspirators have *agreed again*, have *renewed* the conspiracy, or continued it, whenever and wherever one or more act for and with the approval of and under the direction of all."

In *Ex parte Black*, 147 Fed. 832, 838, 841, affirmed 160 Fed. 431, it was sought to remove defendants to Oregon under an indictment found April 3, 1906 (p. 833), which charged that from and on the first of September, 1902, and thence down to and inclusive of the twentieth day of June, 1903, the defendants conspired. There was proof before the commissioner that the conspiracy was consummated and its end accomplished more than three years prior to the finding of the indictment, and the proceeding was dismissed in spite of the allegations of continuance in the indictment. Of this allegation the court said:

"If the illicit scheme is continued and new overt acts to carry it out occur within the period of limitation, the pleader should charge a *new* conspiracy, and the jury may be warranted from all the evidence in finding the existence of such *new* offense within that period."

In *United States* v. *Greene*, 100 Fed. 941, 946, a proceeding for the removal of the defendant for trial in another district, it was urged that the offense was barred by the statute of limitations. It appeared from the indictment that the fraudulent scheme which had culminated in the conspiracy charged in the indictment had originated prior to the period of limitations, but the indictment charged the conspiracy as having been formed within the period. The court said:

"But as *each new overt act* in furtherance of the common purpose, *becomes in law a new conspiracy*,

> the time of the conspiracy may be laid within the period of the statute of limitations, if the overt act was within that period; the prior combination if established and the later overt act being evidence from which a jury may infer the *new* conspiracy."

In *United States* v. *Barber*, 157 Fed. 889, 890, the court directed a removal for trial in another district upon an indictment which charged the formation of the conspiracy at a time prior to the period of limitation because it contained averments of overt acts performed within that period. In so directing, however, it expressed its doubts as to the sufficiency of the pleading, and based its decision solely on the rule that in removal proceedings the technical sufficiency of the indictment was not open to attack.

There is nothing in the cases of *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, and *United States* v. *McAndrews and Forbes Company*, 149 Fed. 823, cited by the government (pp. 53–56), which supports the theory that the crime of conspiracy is a continuing offense, or which is not entirely consistent with the views expressed above, as to the renewability doctrine. In the *Trans-Missouri* case, Mr. Justice Peckham, speaking of the Sherman Act, pointed out that the liability to punishment under the criminal provisions of the act was entirely distinct and separate from the civil remedy by injunction, and said:

> "There can be no question of any act being regarded as a violation of the statute which occurred before it was passed. After its passage, if the law be violated, the parties violating it may render themselves liable to be punished criminally; but not otherwise."

Yet, if the government's argument in the brief now

submitted be sound, Mr. Justice Peckham should have recognized that as the Freight Association agreement, although antedating the Sherman Act, continued in force, the parties became criminally liable thereunder without doing any act whatever and continued so unless they affirmatively abandoned the agreement. Of course, if the point now made by the United States had been suggested in the *Trans-Missouri* case, the court would have ruled that in order to constitute a violation of such a statute, and to prevent any retrospective or *ex post facto* operation, some act under the pre-existing agreement would have to be done sufficient to show or from which could reasonably be inferred the renewal or re-adoption of the old agreement. In the case of *United States* v. *McAndrews and Forbes Company*, there was no question of the statute of limitations, and the acts constituting the alleged criminal agreement, combination or conspiracy were charged to have been done within three years of the finding of the indictment.

Nor is there anything in the cases of the *Northern Securities Company* v. *United States*, 193 U. S. 197, and *Loewe* v. *Lawlor*, 208 U. S. 274, also cited by the government, which in any way sustains the proposition that parties can render themselves liable to be punished criminally under the Sherman Act without doing any act whatever. Both were civil cases: the first brought under section 4 of the act, which vests jurisdiction "to prevent and restrain violations of this act," and the second under section 7, which enables any person injured in his business or property to sue in a federal court and recover three-fold the damages sustained by him. Of course, the

theory of the first suit and the relief sought were to restrain future acts; in the second the damages formed the essential element of the cause of action. In neither was any question involved as to the statute of limitations, and in neither was the court even remotely called upon to determine whether the criminal offenses defined in the Sherman Act could possibly in contemplation of law be committed without the doing of a single act.

The case of *People* v. *Mather*, 4 Wend. 229, is frequently cited as a leading case on conspiracy. The defendant was indicted for a conspiracy to abduct one Morgan. The indictment charged the formation of the conspiracy at Gaines, in the County of Orleans, State of New York, on the 13th of September, 1826. It appeared from the evidence on the trial that the plot had had its inception at an earlier date in Canandaigua county, that Mather had joined in it after it was under way, by cooperating in Orleans county, that it had been followed by the abduction of Morgan, and that there was reason to believe that it had resulted in the murder of Morgan. Upon the trial, two questions arose as bearing on the nature of conspiracy, first, as to the right to indict Mather, who had not participated in the scheme at the time of its inauguration in Orleans county; and, second, as to the right of a witness to decline to answer a question put to him on the ground that it might tend to criminate him.

As to the first of these questions the court decided that the indictment was properly found, saying (p. 259):

> "I admit that it is the illegal agreement that constitutes the crime; when that is concluded the crime is perfect, and the conspirators may be convicted if the crime can be proved. No overt act need be shown or

> even performed to authorize a conviction. If conspirators enter into the illegal agreement in one county, the crime is perpetrated there, and they may be immediately prosecuted; but the proceedings against them must be in that county. If they go into another county to execute their plans of mischief, and there commit an overt act, they may be punished in the latter county without any evidence of an express renewal of their agreement. The law considers that wherever they act, there they *renew*, or, perhaps, to speak more properly, they continue their agreement, and this agreement is *renewed* or continued as to all whenever any one of them does an act in furtherance of their common design."

As to the second question, the court decided that the witness could rightly claim his privilege. not, however, because he was subject to prosecution for any conspiracy, that crime being barred by the statute of limitations, but because there was a probability that the abducted person had been murdered, and murder is a crime for which there is no limitation. The court said (p. 255, 257):

> "Daniels [the witness] could not be indicted for conspiring to carry off or to imprison Morgan, . . . because the statute of limitations furnished a bar to the proceedings . . . If I am correct in my conclusion that the offense of accessories to a murder before the fact is not included within the statute of limitations, it is certainly not improbable that the witness Daniels might have had a fair claim to the privilege he asserted."

In the case of *Ochs* v. *The People*, 25 Ill. App. 379, affirmed in 124 Ill. 399, and cited by the government in its brief at p. 48, the indictment charged a conspiracy formed on November 1, 1885 (p. 393). It was filed April 2, 1887 (p. 395), and it averred a crime committed within the period of the limitation (p. 416). The proof showed

an antecedent conspiracy and the commission of overt acts within the period by all the defendants. The jury thereupon convicted them. There was in this case evidence from which a jury would be fully justified in inferring that within the period of limitation the defendants had again consciously participated in an act in furtherance of the conspiracy and had thus renewed their offense. Only this question of the sufficiency of the evidence to support the verdict of the jury was involved. In affirming the conviction, the court said (p. 416):

> "It being shown that a conspiracy was in existence, every overt act in furtherance of the objects of the conspiracy was, at least as to the person acting, *a renewal of the conspiracy*. To warrant a conviction, therefore, all that was necessary was to establish an existing conspiracy before and at the commencement of the period of limitation and overt acts in furtherance of the conspiracy afterwards. That such overt acts were shown as to *all* the plaintiffs in error, is . . . beyond controversy."

In the Supreme Court of Illinois on appeal, the opinion dealt with the matter in the same way. The conscious participation of the defendants in the acts performed within the period was fully appreciated by the court. It said (124 Ill. 399 at 427):

> "The evidence shows, satisfactorily, that Ochs and Wasserman were members of the conspiracy previous to October 3, 1885, and that they adhered to it afterwards, during the whole interval of time to December 6, 1885, *by their co-operation*, as members of the board, with their fellow-conspirators, in the passing of these false and fraudulent bills."

In *Noyes* v. *State*, 41 N. J. L. 418, the defendant was convicted upon proof that a conspiracy which had been originally formed in New York had been followed by an

overt act committed by him in New Jersey. The question arose as to whether or not the offense was actually committed within the jurisdiction of the courts of New Jersey. The jurisdiction was sustained because it was established that one of the original conspirators had participated with the defendant in the act done in New Jersey, and the *ratio decidendi* appears in the following extract from the opinion (p. 424).:

> "By such joint act the conspiracy was *renewed* and partly executed in this State, in the county of Essex, and . . . thus this crime became cognizable by the courts of that locality."

The question of the renewability of a conspiracy arose in relation to the statute of limitations in the case of *Commonwealth* v. *Bartilson*, 85 Pa. St. 482, 486, upon the consideration of a question of pleading. It was there ruled—in strict conformity with the doctrine of the renewability of conspiracy—that an indictment which alleges a continuing conspiracy prior to the period of limitation and continued within it is bad. The indictment in that case, which contained two counts, charged the defendants with a conspiracy to cheat and defraud one McCoy. The first count laid the crime as of the 20th day of December, 1874, which was over four years prior to the finding of the indictment (the statute of limitations being two years). There were alleged, however, in this count a number of over acts, of which some were within two years of the finding of the indictment, and as to each of these overt acts it was averred that it was "in pursuance and as a renewal of" the said conspiracy. The second count laid the offense as having been committed on the 21st day of May, 1877, the day before the

finding of the indictment, and did not set forth any overt acts. A bill of particulars of this count was furnished by order of the court, and disclosed that it was based upon practically the same evidence as that charged in the first count.

The court held that the first count was bad; that its averments were equivalent to a charge of conspiracy formed upon the 20th day of December, 1874, with a *continuando* down to and through the dates of the various acts; that conspiracy was not a continuing offense but one which was renewable, and that hence the count charged not only one offense, which was barred by the statute of limitations, but a number of other offenses, which rendered it duplicitious. It was also held that the second count was good because it charged a conspiracy formed within the period of limitation, and under it evidence was admissible to establish that though the defendants had once conspired at a period prior to the statutory period, they had engaged in a new conspiracy to the same end within the statutory period. The opinion contains an admirable exposition of the principles which control the determination of the question here at issue. As to the first count the court, among other things, said (p. 486):

> "The conspiracy is averred to have been formed on the 20th day of December 1874. This was more than two years prior to the finding of the bill, and upon that ground the court below quashed the count. It was strongly urged, however, that inasmuch as it was averred in said count that the defendants had in, 'pursuance and renewal of said conspiracy', committed divers overt acts specifically described in said count, the date of one of which at least was within the statutory period, there was a continuance and renewal of the conspiracy from time

to time, and the statute was thereby tolled. This is plausible but unsound. The offense charged was conspiracy. According to all the authorities the conspiring is the essence of the charge, and if that be proved, the defendants may be convicted: Collins *v.* The Commonwealth, 3 S. & R. 220; Commonwealth *v.* McKisson, 8 *Id.* 420; Commonwealth *v.* Judd, 2 Mass. 329; Commonwealth *v.* Tibbitts, *Id.* 536; Commonwealth *v.* Warren, 6 Mass. 74; State *v.* Richie, 4 Halstead, 293; State *v.* Buchanan, 5 Harr. & Johns. 317; People *v.* Mather, 4 Wend. 229. According to the first count, the offense was completed on the 20th of December 1874. The overt acts set forth do not constitute the offense. They are the evidence of it, and are sometimes said to be the aggravation of it. An overt act may or may not be unlawful, *per se.* It is because of its relation to an unlawful combination that it becomes obnoxious to the criminal law. The averment that the conspiracy was 'renewed' from time to time does not meet the difficulty. If it proves anything, it proves too much. The 'renewal' of a conspiracy means to begin it again; to recommence it; to repeat it. *From this it is apparent that each renewal is a new offense; a repetition, it is true, of a former one, but still an offense for which an indictment would lie.* If, therefore, the overt acts were done or committed in renewal of the conspiracy of December 20th 1874, as charged in the count, they aver distinct offenses. It is a well-settled rule of criminal pleading that distinct offenses cannot be joined in the same count. This principle is too familiar to need the citation of authority; we will only refer to the latest case: Hutchison *v.* The Commonwealth, 1 Norris, 472. The difficulty in regard to this count arises merely from a mistake in pleading. *The date of the conspiracy should have been laid within the statutory period.* The Commonwealth must allege and prove a conspiracy within two years. If this cannot be done the Commonwealth has no case. The pleader evidently felt the strain of this part of his case when he introduced the averment that the overt acts were in 'renewal' of the original conspiracy. It

was practically laying an offense with a *continuando;* it was an attempt to prove the existence of a crime within the statutory period by showing its commission outside of such period, and that it had been continued down to a time within it."

As to the second count the court said (p. 489):

"But if the overt act charged in the indictment, or proved to have been done within two years, is sufficient to satisfy the jury of the existence of a conspiracy at that time, it is wholly immaterial when the parties thereto first formed the unlawful combination in their minds, or gave effect to it by concert of action. If it has been *renewed* from time to time, and overt acts committed through a series of years, and one of said acts has taken place within two years, *each renewal constitutes a fresh conspiracy, for which an indictment will lie* It has been held that where a conspiracy had been formed outside of the jurisdiction of the court, an overt act committed within the jurisdiction is evidence of a conspiracy there; Rex *v.* Scott, *supra.* And all who accede to a conspiracy after it is formed become conspirators; People *vs.* Mather, *supra.* For the reasons given, we think the court below erred in quashing the second count."

In the light of these authorities, it is submitted that the sound doctrine is that the crime of conspiracy is not an essentially continuous offense, but that it is subject to renewal and that the renewal may be evidenced by the conscious participation of any of the conspirators in acts done for the purpose of effecting the object of the original conspiracy.

IV.

Nor do the alleged overt acts, even if available, show the commission of the crime of conspiracy within the three years.

But, whether the crime of conspiracy is to be treated as subject to continuance by overt acts or as subject to renewal by such acts, it is submitted that the indictment in the case at bar does not show that the conspiracy charged therein was either continued within the period of the limitation or was renewed by any of the alleged overt acts done during those years.

It should be recalled, however, that the question arising on the record now before the court is not whether the alleged overt acts done in 1907 and 1909 show a renewal of the conspiracy of 1903, for no such charge is to be found in the indictment, and no such contention is advanced by the government in its brief. Indeed, in one part of this brief, as we have already noticed, the doctrine that a conspiracy may be renewed by overt acts done to effect its object is distinctly repudiated (p. 45). The only contention seems to be that the alleged overt acts show the actual continuance of the original conspiracy; that is, the continuance of the commission of the criminal offense of conspiring throughout the whole period. That these allegations do not show this must be evident from a simple perusal of the indictment. It is only by going outside the record and indulging in speculation and surmises that the government attempts to show that the acts could in any way be construed as connected with the original conspiracy, or as germane to any of its objects or

purposes. The original conspiracy as charged in the indictment did not contemplate any such acts in 1907 and 1909.

It is to be always remembered that among the most fundamental of the rules of criminal pleading are those that require (1) that "all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication" (*Pettibone* v. *United States*, 148 U. S. 197, 202; *United States* v. *Hess*, 124 U. S. 483, 486); (2) that facts must be pleaded and that conclusions are of no avail (*United States* v. *Cruikshank*, 92 U. S. 542, 558); *In re Greene*, 52 Fed. 104, 111); (3) that the charging part of an indictment for conspiracy must be sufficient in itself without recourse to the allegations of overt acts (*United States* v. *Britton*, 108 U. S. 199, 205), and (4) that where the facts alleged are susceptible of two interpretations, in one of which they lead to a conclusion of guilt and in the other to a conclusion of innocence, "a court of justice has no alternative; it must pronounce in favor of innocence" (*The Bothnea & The Jahnstoff*, 2 Wheat. 169, 177; *Coffin* v. *United States*, 156 U. S. 432).

If the indictment in the case at bar be analyzed, it will be found that the averments which must be relied upon by the government for the purpose of establishing that the crime was committed within the three years will not suffice for that purpose. The only averments which even purport to relate to a time within the period of limitation are the averments that continuously and at all times during the period of six years, to

wit, from the 30th of December, 1903, until and on the day of the finding of the indictment, the defendants were engaged in a conspiracy in restraint of trade, the averments of the duration of the control which was contemplated by that conspiracy, namely, at least one year, and the averments of the acts performed in pursuance of it during the period subsequent to July 1st, 1906. None of these averments are sufficient to show the actual commission, that is, continuance, of the crime within the three years.

The first of these averments to the effect that the defendants engaged in a conspiracy on the 30th of December, 1903, and continuously thereafter during the entire period of the six years, may be dismissed at once as a mere statement of the pleader's conclusion which, unless supported by allegations of fact, cannot avail as a charge of the actual commission of the crime within that period. This result is well supported by the decisions of this court. *Cruikshank* v. *United States*, 92 U. S. 542, 558; *Pettibone* v. *United States*, 148 U. S. 197, 203. See also the authorities discussed above at p. 47 *et seq.*, which establish that the allegation of a *continuando* should be disregarded as mere surplusage.

Now, even if an indictment could be held to charge a continuing offense because it charged an agreement which contemplated the doing of acts in the future, it would be apparent that, in order to impute continuance up to and within any particular period, it must appear that the agreement provided or contemplated that acts should be done within that particular period. This must appear by direct averment and not through processes of reasoning

or inference, and if the averments of the nature of the agreement are equally consistent with the conclusion that, though it contemplated acts in the future, it did not contemplate that they should continue within the period of the limitation, as with the theory that it contemplated that it should continue within that period, it cannot be held to charge that they were so to continue. It is well settled that where it is essential to criminality that particular acts shall have been done at a particular time, the allegation that they were done at that time must be so distinct as to preclude the possibility that they were done at some other time. This principle is well illustrated by the decision of this court in *United States* v. *Simmons*, 96 U. S. 360, 363. This case arose under section 3266 of the Revised Statutes. The court held the indictment fatally defective on the ground that, while it averred that the defendant had caused a still and boiler and other vessels for the purpose of distilling to be used in a certain building where vinegar was manufactured and produced, it did not charge that vinegar was being manufactured and produced in that building *at the time* the offense was alleged to have been committed. The court said (p. 363):

> "Nor does it sufficiently appear that vinegar was manufactured or produced in the building and on the premises referred to *at the time* the still and other vessels were used for the purpose of distilling. *It is consistent with the averments* that the vinegar had been manufactured or produced prior to the date when the alleged distilling occurred. The two facts must co-exist, in order to constitute the offense described in the statute."

In the case at bar, the indictment in its allegations of

the time during which it was contemplated that the control of the Pennsylvania Company should continue, is scrupulously careful to avoid the specification of any definite period beyond the term of one year from the 4th of January, 1904, and it contains no averment which suffices to charge that continuance of such control during any specified time beyond the one year was contemplated or agreed upon (rec. pp. 5, 6). There is, therefore, no allegation that the parties agreed to conspire for any longer period than the year.

The government argues in its brief (p. 37) that the mere allegation that the conspiracy contemplated the ruin and decay of the facilities of the Pennsylvania Company suffices to impute continuance through all time. This is not and cannot be the law, and such an averment cannot be held to have the elements of precision necessary to the charge of the commission of an offence at a particular period. There is no allegation that such ruin and decay resulted from the acts of the conspirators or that they ever agreed to or contemplated acts subsequent to July 1, 1906, for the purpose of effectuating such ruin or decay.

If the indictment in the case at bar is to be held to charge the commission of an offense, or the continuance of an offense, within the period of limitation, it must be because it charges the commission of some act within that period of such an unequivocal character as of itself to prove that the conspiracy was then being continued.

These essential averments nowhere appear in the body of the indictment, but must be found, if they are to be found at all, in the allegations of overt acts alleged to have been done in pursuance of the conspiracy. Yet

these allegations, as we have seen (*United States* v. *Britton*, *supra*), are not available. But if available, they would, in the case at bar, be wholly insufficient. It may ordinarily be true that when the commission of the offense of conspiracy has been duly charged in the indictment within the period of limitation, allegations of overt acts which do not of themselves suffice to constitute the offense or shows its commission will be sufficient. In that case, the allegations of overt acts are inserted by way of aggravation, or merely to satisfy a statutory requirement that some overt act in addition to the act of agreeing be alleged, or as a bill of particulars of the claim of the prosecution. Even in that case, the acts must be such as clearly tend to effect the object of the conspiracy. Thus in *United States* v. *McLaughlin*, 169 Fed. 302, 307, Judge Lochren, sustaining a demurrer to an indictment for conspiracy, said:

> "It seems to me that an overt act must be an act which has a tendency at any rate to carry out the object of the conspiracy, or in some way tends to make it effectual. It may not be sufficient of itself to complete the offense, but it should have a tendency to do so. I do not imagine that any letter which could have no tendency to mislead the corporations which are the alleged victims could be claimed to be an overt act at all. It must be an act having a tendency to effectuate the object of the conspiracy. . . . It seems to me that the overt acts alleged do not support the charges of fraud which are the subject of the alleged conspiracy, and that they are immaterial; that there is not in the overt acts charged in the indictment anything germane to the subject of the alleged fraud."

And in the latest case upon the point, *Lonabaugh* v. *United States*, 179 Fed. 476, 481, the Circuit Court of

Appeals, Eighth Circuit, speaking by Circuit Judge Van Devanter, decided that the overt act should clearly be directed to the attainment of the object of the conspiracy, saying (at p. 481):

> "Nor is it enough that the overt act be directed to the attainment of some other object; it must be directed to the attainment of the object which brings conspiracy within the interdiction; and when that object is attained 'the object of the conspiracy,' in the sense of the statute, is effected."

But a different rule is applicable where the averment of the conspiracy itself does not suffice to charge its commission within the period of limitation and the overt acts are relied upon to bring it within that period and, as it is sometimes inaccurately suggested, to toll the statute. As those allegations furnish the sole basis from which a court can conclude that the offense has been actually committed within the period of the limitation, the acts must manifestly be such that, taken in connection with the charge of conspiracy formed at an earlier period, they will suffice to show that the conspiracy was actually continued at the time of their performance. In order that an act may suffice for this purpose, it must be of such a character as to lead to the conclusion that the conspiracy was then being pursued. If it is reasonably consistent with any other conclusion, if it is consistent with innocence, or if it does not exclude any other reasonable hypothesis, it cannot be sufficient to show the commission of a crime. This results inevitably from the fact that such acts are admissible only to establish circumstantially the existence of the ultimate fact, which is the conspiracy itself, and from the rule, which is settled beyond dispute,

that where an ultimate fact is to be established by circumstantial evidence, the chain of circumstances must be such as to exclude every reasonable hypothesis other than that of guilt. *Lopez* v. *Campbell*, 163 N. Y. 340, 347.

If the acts charged in the indictment to have been done in 1907 and 1909, to wit, overt acts 13 to 18 (rec. pp. 15 to 18) be considered in the light of these principles, it will be clear that they cannot be held to show the actual commission of the criminal offense of conspiracy, and that proof of those acts, even in connection with the antecedent conspiracy alleged in the indictment to have been formed in 1903, would not justify the submission to a jury of the question whether that conspiracy was continued by those acts into the years 1907 and 1909.

This becomes especially clear if the alleged overt acts be considered in connection with the allegations of the plea of the defendant Kissel, which are admitted by the demurrer.

It appears by the plea of the defendant Kissel (rec. p. 33) that prior to the alleged overt acts (13 to 18), done in 1907 or 1909, and on October 2, 1906, a receiver of the property of the Pennsylvania Company was appointed by a court of record and of general jurisdiction in the State of Pennsylvania, that such company and its officers and agents had been duly enjoined from in any way intermeddling with or in any manner disposing of its assets and property, and that thereupon one George H. Earle had duly qualified as such receiver, and had duly taken exclusive possession of all and singular the assets and property of the company, and *exclusive charge and control of its business, affairs and choses in action*, and had ever since duly continued in such possession, charge and

control. It further appears by such plea that the defendant Kissel was not a party to and did not participate in the said action or the said proceeding for the appointment of a receiver, and did not directly or indirectly procure, induce, counsel, advise, aid or abet the institution of such action, the appointment of said receiver, or the making of the orders restraining the company, its officers and agents, from intermeddling or in any manner disposing of its books, moneys, assets and property, and appointing the receiver. To repeat, these allegations were admitted by the United States in and by its demurrer.

The object and purpose of these allegations were to show that the alleged overt acts of 1907 and 1909 could not be held on the record before the court to have been done in order to effect the object of the original conspiracy, because the refinery was then no longer in the control of the conspirators, the business and affairs of the Pennsylvania Company were in the exclusive charge and control of the receiver and of the court, and none of the alleged overt acts could interfere with such exclusive possession and control or in anyway affect the right of the receiver to engage in interstate commerce.

If the object of the original conspiracy in 1903 in alleged violation of the Sherman Act was to keep the refinery of the Pennsylvania Company closed, and by securing and retaining control of its business and affairs to prevent competition with the American Company, and if, as admitted by the government's demurrer, a receiver had taken exclusive possession and control of its property, assets and business on October 2, 1906, and had ever since continued in such exclusive possession and control,

and if the company itself and its officers and agents had been enjoined from intermeddling with the property, it reasonably followed that the allegations as to the overt acts done in 1907 and 1909 wholly failed to show how such acts could possibly have been done to effect or could possibly effect the object of the original conspiracy of 1903. The court below was therefore warranted in declaring in its opinion that "these alleged overt acts had no tendency to accomplish the object of the conspiracy" (rec. p. 60).

It is essential to bear in mind that the case was before the court below, as it is here, on the record and not on hypothetical facts stated in the government's brief, which facts the indictment does not allege and which the government did not offer or ask to prove, or upon "any possible supposition" such as the government's brief indulges in (p. 61 *et seq.*). In demurring, the government admitted that Receiver Earle, and not the conspirators, had been in exclusive possession and control since October, 1906. It cannot now suggest facts outside the record inconsistent with the allegations thus admitted by its demurrer. If the government had wanted to show the facts now suggested in its brief (pp. 56–66), it would have duly traversed the pleas, but it elected to stand in that respect on its demurrer. We are not called upon to challenge the suggestion that any act harmless and innocent on its face may when connected with other acts constitute part of an attempt to commit a crime or be done to effect some criminal object. Nor are we called upon to indulge in speculations as to what may be imagined or conceived to have occurred in addition

to what the record shows. The government in and by its demurrer submitted to the court the question of law whether the allegations of overt acts done in 1907 and 1909 showed the commission of the crime of the conspiracy within the three years preceding the finding of the indictment. The perusal of the allegations of the overt acts will demonstrate that they do not show the continuance of a pre-existing conspiracy, even if they could properly be referred to now in order to bolster up an indictment otherwise fatally defective.

(1) It is alleged (rec. p. 15) that on February 13, 1907, the defendants Thomas, Donner, Senff and Mayer attended a meeting of the board of directors of The American Sugar Refining Company and each voted for and thereby secured the adoption of the following resolution:

> "*Resolved*, That in accordance with the resolution passed by the stockholders at their last annual meeting, the secretary, in the name of and for the company, send to Mr. John E. Parsons, the counsel of the company, a letter giving to him a copy of the resolution of the stockholders in reference to proceedings in the Segal matter; asking him to co-operate in defending against any such proceedings; and agreeing as to him that the company assumes the entire responsibility of what has occurred in the Segal matter; and that it will defend, protect, and indemnify him; and in the event of a suit and possible recovery, that it will either pay the same, or if any appeal shall be taken, that it will stay proceedings and secure and, if and when required, make payment."

This resolution, as appears on its face, was adopted in accordance with a prior resolution of the stockholders of the American Company. It was adopted more than four months after the appointment of George H. Earle as Receiver of the Pennsylvania Company. It purports only

to deal with the defense of threatened legal proceedings and with indemnity for past acts in the event of suit and possible recovery. It contemplates and provides for no present or future act tending to keep the refinery of the Pennsylvania Company closed or to interfere in any way with its business, assets and affairs then admittedly in the exclusive possession and control of a receiver. There is absolutely nothing in this resolution tending to furnish even a scintilla of evidence that the conspiracy of 1903 still existed or was thereby renewed or that the indemnity of the President and Counsel of the Company could in any possible way effect the object of the original conspiracy. Moreover, it is to be observed that the act thus alleged to have been performed is in nowise connected by appropriate averments with the subject matter of the original conspiracy and that there is nothing to indicate that the Segal matter there referred to was the loan or conspiracy of 1903. The resolution amounts to no more than an agreement by parties who are morally responsible for an act done in the past, to relieve their agents and indemnify them. This is not a criminal act. If the charge under consideration were any other than conspiracy, this proposition would be too plain to require argument. If Mr. Parsons had committed a trespass upon the real property of Mr. Segal in 1903 for which he was subject at that time to civil and criminal liability, no one would dream of holding that any persons who came forward to contribute to the defense of a suit, either civil or criminal, or who agreed to assist him in paying, or to relieve him of the burden of paying any judgment that might result therefrom, could, by such acts,

be renewing the trespass or rendering him or themselves criminally liable for the trespass.

(2) It is alleged (rec. p. 16) that Mr. Parsons, General Counsel of the American Company, wrote a letter on February 15, 1907, to the Secretary of the American Company, acknowledging the receipt of a copy of the resolution referred to in the last paragraph and stating that Receiver Earle had for some reason delayed proceedings, that the Department of Justice ought to refuse to aid his claim, that Mr. Johnson described the claim as farcical, and that Mr. Parsons both on the company's account and his own would co-operate in defending any proceeding which might be taken by Mr. Earle. It must impress the court as preposterous, if not trifling, to ask it to rule that this letter of Mr. Parsons to the Secretary of the American Company could in any aspect be held to be an overt act tending to effect the object of the alleged criminal conspiracy of 1903, or that a jury could be permitted to infer a criminal intent therefrom. Surely, an agreement to defend a threatened legal proceeding cannot constitute the commission or renewal of the crime of conspiracy.

(3) It is then alleged (rec. p. 17) that the defendant Kissel on May 3, 1907, wrote a letter to the American Company enclosing vouchers for disbursements previously made in connection with the loan to Segal, such as for rent of safe deposit vaults and legal services of lawyers, amounting to $1,658.50, and asking payment. Such a letter may, of course, be evidence against Kissel that he had acted as agent in a Segal matter, but it certainly is not evidence that on May 3rd, 1907, or at any date mentioned in his letter he did any *act* to effect

the object of the original conspiracy of 1903. There is no allegation identifying the loan or connecting it with the loan of 1903. The court is asked to read into this letter a number of hypothetical facts, none of which are alleged in the indictment or in the special plea. Thus, the court is asked to assume without the slightest allegation that Kissel then continued to hold the proxy or power of attorney to vote the stock (brief U. S. p. 63) and that this was the chief foundation of the American Company's continued control over the management of the Pennsylvania Company, utterly disregarding the admitted fact of the exclusive possession and control of the receiver. Reference is made in the government's brief to Kissel's immunity plea as showing that he retained possession of the proxy until May 26, 1909 (p. 63), yet in another part of the brief it is asserted that the immunity plea of Kissel "is not now before the court" (p. 13). It is asserted that this continued possession of the proxy, nowhere alleged in the indictment, tended to effect the object of the conspiracy "because retention of the power of attorney by somebody was essential to its exercise" (p. 63). As matter of fact, the power of attorney was wholly useless in 1907 except as evidence of past acts, for two reasons: first, because Receiver Earle was in exclusive possession and control of the property and business affairs of the Pennsylvania Company, and the latter was enjoined from intermeddling therewith; and, secondly, because the power of attorney was then absolutely inoperative and void, for by its terms it endured only during the life of the agreement of December 30, 1903, that is, to October 1, 1904, or January 4, 1905, as Mr. Segal

might elect, and by law it expired within two months after its date, December 30th, 1903. Under the laws of Pennsylvania, of which the court below was bound to take judicial cognizance (P. L., March 5, 1903, No. 17), it was expressly provided as follows:

> "That stockholders of all corporations of this Commonwealth, wherever residing, who shall be entitled to vote at any corporate meeting or election thereof, shall have and be possessed of the right and power to vote thereat by proxy duly executed by the stockholder, either with or without notarial or other acknowledgment, but properly attested by the signature of a witness, and that one person may be constituted and act as proxy for any number of stockholders: Provided, however, That *proxies dated more than two months prior to any such meeting or election shall not confer right to vote thereat.*"

But, however this may be, the mere writing of a letter by Kissel to the American Company asking payment of past disbursements, could not constitute in and of itself an overt act tending to effect the object of the conspiracy of 1903, or be evidence of the continuance of a criminal intent. *United States* v. *Black*, 160 Fed. 431, 435; *United States* v. *Biggs*, 157 Fed. 264; *United States* v. *McLaughlin*, 169 Fed. 302, 307; *Lonabaugh* v. *United States*, 179 Fed. 476, 479.

(4) It is then alleged (rec. p. 18) that Messrs. Thomas, Donner, Senff, Frazier, Mayer and Parsons attended a meeting of the board of directors of the American Company on the 2nd day of November, 1907, but nothing is disclosed as to what was done at this meeting. It would seem to require no discussion to refute the argument in the government's brief (p. 60) that because at that meeting something *might* have been done to further

a purpose which was conceived four years prior thereto, the court may hold the allegation sufficient to establish the continuance of a criminal intent.

(5) And finally it is alleged (rec. p. 18) that a letter was written by Mr. Parsons on the 19th of April, 1909, in which he says that he will send an advertisement about the Pennsylvania Company bonds to Mr. Johnson, that Mr. Johnson has the matter in charge, and that he, Mr. Parsons, thinks it undesirable to submit the bonds to the action of a possibly hostile committee (p. 18). It is seriously suggested to this court, in the government's brief (p. 62) that this may be construed as an improper act of Mr. Parsons, done intentionally to effect the object of a criminal conspiracy!

As the overt acts averred had no tendency to effect the object of the conspiracy, they could not, even under the theory urged by the government, operate to show the continuance of the offense or its renewal. An act to have that effect—since it would deprive the accused of his legislative amnesty and compel him to account for conduct now long past—ought to tend clearly and emphatically to effectuate the object of the pre-existing conspiracy or to show the continuance of a criminal intent and purpose.

It ought also to be remarked that the indictment does not charge that a single overt act within the period was done by the defendant Harned. As to him, there is absolutely nothing to show that he ever participated in any way in the alleged conspiracy since January, 1904. The theory of the government is that he, nevertheless, indefinitely continued criminally liable for any act of the other conspirators unless he could affirmatively show an actual

abandonment of the conspiracy on his part, and that the burden was upon him to allege and prove such abandonment.

V.

THE SPECIAL PLEAS IN BAR WERE SUFFICIENT IN FORM AND DID NOT IN SUBSTANCE OR EFFECT CONSTITUTE PLEAS OF NOT GUILTY.

The United States further argues that even if the defense of the limitations may be set up by special plea in bar, the form of the special pleas in the case at bar is defective because "the facts as set forth therein in effect constitute a plea of not guilty" (rec. pp. 54–55). This is the only defect specified in the demurrer of the United States, but other defects are now attempted to be assigned, such as duplicity. The contention that the pleas constitute pleas of not guilty should be completely answered by the fact that neither plea directly or indirectly denies the commission of the offense as alleged in December, 1903, or the commission of any of the alleged acts. Hence, each plea would be clearly demurrable as a plea of not guilty.

It is quite true that ordinarily the defense of the limitation under section 1044 of the Revised Statutes will be raised in the simple form of the precedents printed at the end of the government's brief (pp. 74–80), but simplicity was in each of the cited cases practicable because of the form of the several indictments. In the case at bar, however, the allegations of the *continuando* and overt acts in 1907 and 1909 seemed to call for more specific and detailed allegations in the special pleas so as to advise the prose-

cution of the exact issue tendered. The court will observe that each special plea in the first paragraph distinctly alleges the defense of the limitation in the language of section 1044 (rec. pp. 32, 52), and then sets forth that the defendants were not fugitives from justice within the intent and meaning of section 1045 (rec. pp. 34, 53). According to the theory of the government, if the pleas had stopped there, they would have been good. It is, however, submitted that, even if irregular, the remaining allegations of the pleas were strictly and technically unnecessary and can be disregarded. They did no harm; they could not mislead or create immaterial issues, and they tendered no different issue than would have arisen if they had been omitted and the precedents cited by the government followed. A pleading, otherwise good, is not rendered wholly insufficient simply because it contains unnecessary or immaterial allegations. The test is whether, disregarding such allegations, the plea is or is not otherwise sufficient to raise the issue tendered in due form. That is the fundamental purpose of all rules of pleading.

The form in the case at bar is substantially the form in which the plea was interposed in the case of *United States* v. *Hirsch* (see government's brief p. 77). The plea in that case did not confine itself to a mere statement that it appeared on the face of the indictment that the crime therein alleged was barred by the statute of limitations, but averred as a matter of fact that the conspiracy charged in the indictment was completed three years before the indictment was found, and hence raised precisely the same issue of fact which is tendered by the slightly

more elaborate traverse contained in the pleas now before the court.

As it is conceded that the averments of the overt acts were unnecessary (brief U. S. p. 33), and as the indictment is in no way to be aided or affected by them (*United States* v. *Britton*, 108 U. S. 199, 204; *Pettibone* v. *United States*, 148 U. S. 197, 203; *United States* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 831; *United States* v. *Haas*, 163 Fed. 908, 911), it follows that the denial of the alleged tendency of the overt acts to effect the object of the conspiracy could raise no issue other than would properly arise if the defense of the limitation were pleaded in the form used in *United States* v. *Hirsch*.

But is there any sound reason in the principles of pleading why the allegation in an indictment of the time of the commission of the offense may not properly be denied in a special plea setting up the defense of the statute of limitations, or why a defendant may not deny in a special plea any fact not necessary to be alleged in the indictment but which is inserted for the purpose of anticipating the defense of the limitation? The government, in its brief, candidly admits that if it had attempted to anticipate the defense of the limitation by alleging in the indictment that the defendants had been fugitives from justice, such an allegation could be properly denied in a plea in bar setting up the defense of the limitation (pp. 14, 20). If this be so, then for the very same reasons and on the same principles of pleading, a defendant in a special plea setting up the defense of the limitation should be permitted to deny any allegation which may be inserted for the purpose of anticipating

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that defense or which in effect would, if true, defeat it. In the case at bar, the allegations of the *continuando* of the offenses originally committed in 1903 and the allegations that certain overt acts were done in order to effect the object of the original conspiracy were allegations which, in all fairness, a defendant ought to be permitted to traverse on a plea of the defense of the limitation or of immunity.

Indeed, if an accused could not traverse such allegations by a special plea, he could readily be deprived of the substantial right and important privilege of setting up the defense of the limitation or of immunity by special plea in bar whenever the prosecutor saw fit to frame the indictment with a *continuando* or to insert allegations in anticipation of either defense. It is the settled rule in this court that it is not necessary to the validity of an indictment that it should aver the commission of the offense within the statutory period (*United States* v. *Cook*, 17 Wall. 168), and it is also a settled rule of criminal procedure that the averment of time is not ordinarily material. Bishop's New Crim. Proc., vol. I, sec. 386; *Lorenz* v. *United States*, 24 App. D. C. 337, 387; *Ledbetter* v. *United States*, 170 U. S. 606, 612. Therefore, it would follow that if an accused could not traverse the allegation of time, his rights would be subject to the whim or caprice of the prosecution; for by the mere device of inserting in the indictment a date within the statutory period or alleging a *continuando*, the prosecutor could readily deprive the accused of the substantial privilege and perhaps the vital right of setting up the defense of the limitation by special plea in bar and thereby save himself from further

prosecution. Surely, an accused, even in a conspiracy case, is not at the mercy of the prosecutor as he would be if allegations that trivial and inconsequential acts were done to effect the object of the conspiracy could not be traversed under a defense of the limitation. The fair, just and true rule should be that the right to interpose a special plea in bar implies and includes the right to traverse the allegations of time or any other allegation not consisting of the very gist of the offense, whenever such denial is necessary to present the essential and controlling element of the defense of limitation or immunity or former jeopardy.

Thus, upon a plea of former jeopardy, of pardon, or of immunity, the issue of fact as to time must constantly and necessarily arise. The identity of the offense charged in the indictment with that which was the subject of the former jeopardy, is often a subject of doubt, and dependent upon the precise time of the alleged offense. This is an issue of fact which it may often be necessary to determine in advance, and in some instances may unavoidably involve a traverse of the allegations of the indictment to which the plea is interposed.

Or, suppose that one who was indicted for a continuing offense had secured a pardon and that the indictment charged the commission of the offense as of a date subsequent to the date of the pardon. To render the pardon available under the plea, it would manifestly be necessary to traverse the date of commission laid in the indictment. Or, again, suppose the accused had duly secured immunity by compulsory testimony, would he be deprived of the right of setting up that defense by special plea if

the prosecution deliberately or inadvertently alleged an erroneous time for the commission of the offense? It would, therefore, seem only common fairness and justice that a plea in bar may traverse at least the date at which the offense is charged to have been committed, when necessary to set up a special defense; and this is all that in any view of the defendants' pleas they can reasonably be claimed to have attempted to do.

An illustration of such a situation under the defense of former jeopardy is to be found in the facts presented in *Matter of Neilsen*, 131 U. S. 176, 186. There the defendant had been convicted of the offense of cohabiting with more than one woman, and it was sought to try him again for an act of adultery charged to have been committed upon the day following the period of the cohabitation alleged in the former indictment. He interposed a plea of *autrefois convict*, to which the government demurred. It appeared by the plea that the period of cohabitation had in fact continued beyond the time laid in the first indictment and included the day of the adultery laid in the second indictment. This court held that the adultery was included in the continuing crime of cohabitation, that that crime constituted a single offense, embracing the entire period up to the time of the indictment, and that hence the act of adultery was included in it, *though averred as of a day later than the period laid in the former indictment.* It is true that this case did not present any traverse of the indictment to which the plea was interposed and involved merely proof of matter extraneous to the indictment upon which the former conviction was had. But let us suppose that in

that case the indictment, for the purpose of avoiding the plea, had laid the adultery as committed on the day after the finding of the first indictment for cohabitation. Concededly the act of adultery, if committed on that day, would not be barred by the conviction for the cohabitation. Suppose, then, that the accused had ceased to cohabit on a date preceding the finding of the first indictment, and had committed no act of adultery subsequent to that time, and that hence it became necessary to the preservation of his rights to establish that the date laid in the indictment was erroneous. Manifestly, he could do this only under a plea of former jeopardy. Is it the law that he could not so plead if he had necessarily to traverse the allegation of time? Yet if he had to interpose a plea which did not traverse the date and merely set up the record of the first conviction, his plea would be bad on its face and demurrable. If he pleaded not guilty, he would surely suffer conviction despite his prior jeopardy; nor would he be saved by the variance in time, because that constitutes only an immaterial variance. So the defendant would be twice punished for an offense merely because it was not open to him to traverse in a special plea of former jeopardy the immaterial allegation of time contained in the indictment.

It is, therefore, submitted upon this point of pleading that the pleas in bar were sufficient in law to set up the defense of the limitation; that this is so whether the crime of conspiracy be held to be continuous or non-continuous, and that the court below committed no error in overruling the demurrer of the United States. This view alone is sufficient to sustain the judgment below.

VI.

The pleas are not duplicitous.

The government's contention that the pleas, if construed to traverse any material fact averred in the indictment, would be duplicitous (p. 31) as involving pleas of not guilty as well as pleas of the statute of limitations, is met by two answers. First, as pleas of not guilty they would be incomplete and demurrable, since, if there were no statute of limitations, the failure to traverse participation in the conspiracy at its inception would admit the commission of the offense. There is, in fact, no denial of any material allegation of the indictment. A demurrer for duplicity lies only where the pleading unites two sufficient pleas. 22 Cyc. 387; 10 Encyc. Plead. & Proc. p. 535; 1 Bishop's New Crim. Proc., sec. 440; Wharton's Crim. Plead. & Prac., sec. 243; *United States* v. *Patty*, 2 Fed. 664, 667; *State* v. *Thompson*, 31 Utah 228, 232; *Commonwealth* v. *Simpson*, 9 Metc. 138, 141; *Commonwealth* v. *Stowell*, 9 Metc. 569; *Polinsky* v. *People*, 73 N. Y. 65, 72; *People* v. *Kane*, 43 N. Y. App. Div. 472, 474 note, aff'd 161 N. Y. 380; *Rosekrans* v. *People*, 3 Hun 287, 294. Secondly, the objection that the plea is duplicitous is a technical one which must be specifically urged in order to be available. *Pooler* v. *United States*, 127 Fed. 509, C. C. A.—1st Cir.; *Kilbourn* v. *State*, 9 Conn. 560, 563; Bishop's New Crim. Proc., vol. I, sec. 777, sub. 1; 7 Encyc. Pl. & Pr. 243. No such defect as duplicity was urged in the demurrers (rec. pp. 54, 55).

VII.

IF NO ERROR WAS COMMITTED BY THE COURT BELOW, THE FINAL JUDGMENT SHOULD NOT BE REVERSED SIMPLY TO PERMIT THE UNITED STATES TO PLEAD OVER.

The last point of the brief for the United States urges (p. 72) that the court should grant a new trial, because the United States did not plead over or traverse the special plea after its demurrer had been overruled. This is asked even if it be held that the court below did not err in not granting what was not asked.

A number of assignments of error made when the writ of error was taken out stated that the court below erred in dismissing the indictment without permitting the United States to traverse the special pleas in bar and without requiring the defendant to prove the facts alleged in his plea (see assignments 13–18 and 45–46, pp. 73–74, 82). As matter of fact, these alleged errors were not in any way or at any time called to the attention of the court below. The record shows, by the order and certificate of the trial court (p. 69), that the order and judgment in the case at bar were settled upon due notice to the United States and approved as to form by its attorney two weeks after the filing of the opinion; that they were subsequently and two weeks later re-settled upon application of the United States; that at no time prior to the entry of the order and judgment or the re-settlement thereof, was any suggestion made by the United States to the court or to the defendant's attorneys that the United States did not intend and elect to stand on its demurrer, but desired to be permitted to plead over and traverse the special plea in

bar, and that no application or motion was at any time made to the trial court by the United States for leave to plead over and traverse the allegations of the defendant's pleas in bar, although the United States had almost an entire term after the entry of judgment in which to make such motion or application. The circumstances under which the trial court came to make such certificate appear in the record, at pages 68–69, and the authority of the court to grant such certificate in order to make the record clear and prevent misapprehension cannot be doubted. *Gagnon* v. *United States*, 193 U. S. 451, 456; *In re Wight, Petitioner*, 134 U. S. 136, 143; *United States* v. *Adams*, 9 Wall. 661, 663; *Phelps* v. *Mayer*, 15 How. 160, 161; *Kelly* v. *United States*, 27 Fed. 616, 617; *In re Welty*, 123 Fed. 122, 125; Bishop's New Crim. Proc., vol. I, sec. 1343.

It is true that the United States in its brief does not urge upon this point any specific error of the trial court, but, nevertheless, it asks a reversal in order that it may be permitted to traverse the plea in bar as fully as if it had asked leave to plead and it had been denied, with due exception on its part. It would be difficult, of course, to perceive how it could be suggested that the court below erred in not granting the United States leave to plead over when it is conceded in its brief that it did not even ask and did not want any such leave (pp. 32, 72).

If we are correct in assuming that the function and appellate jurisdiction of this court on writs of error taken under the act of 1907 is as in all cases of error, there ought to be no jurisdiction to reverse except upon error

shown, and the failure of the government to apply to the court below for leave to plead over should preclude it from now insisting that there was error in that respect. *Alexander* v. *United States*, 138 U. S. 353, 355; *Lloyd* v. *Preston*, 146 U. S. 630, 645.

In *Allis* v. *United States*, 155 U. S. 117, 122, Mr. Justice Brewer said:

> "Evidently the claim of coercion is an afterthought from subsequent study of the record. But it is settled that no such afterthought justifies a reviewing court in reversing the judgment. A party must make every reasonable effort to secure from the trial court correct rulings or such at least as are satisfactory to him before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions."

The court then quotes with approval the following language from *Harvey* v. *Tyler*, 2 Wall. 328, 339:

> "However it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself and fairness to the court which makes the rulings complained of, require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception."

This rule requiring due exception is followed even in capital cases. *Tucker* v. *United States*, 151 U. S. 164, 170; *St. Clair* v. *United States*, 154 U. S. 134, 153; *Lewis* v. *United States*, 146 U. S. 370, 379.

The same rule obtains in criminal cases in New York. Thus, in *People* v. *Jackson*, 196 N. Y. 357, 362, recently decided, Chief Judge Cullen said:

> "To permit the party to remain silent and suffer the error to go unchallenged and claim on an appeal from an adverse judgment the benefit of the error, as if objection and exception had been taken, would not conduce to the proper administration of justice nor tend to secure a fair trial for the defendant, but simply give him an opportunity to reverse on appeal a proper judgment."

A trial court should not be charged with error and its judgment set aside in a criminal case on the appeal of the United States on the ground that the court failed to grant rights or privileges never asserted or asked for. The act of 1907 is sufficiently progressive, if not revolutionary, in criminal procedure, and surely Congress did not contemplate that it was granting to the prosecution in criminal cases the right to secure more than a review of errors committed in the court below.

No case that we have been able to find has held under section 701 of the Revised Statutes that the court may reverse or modify a judgment in a criminal or civil case where no erroneous ruling by the court below has been shown. In all cases of the reversal or modification of a judgment under that section, error was shown to have been committed. The court is now asked by the government to give it the same benefit as if it had duly asked the court below for leave to withdraw its demurrer and plead over and thus mend its hold notwithstanding its deliberate election not to plead over. In other words, the court is expected to rule that under the Criminal Appeals Act of 1907, it has jurisdiction to reverse or modify without error and due exception. Constitutionally speaking (Art. III, sec. 2), the court, of course, is exercising appellate jurisdiction. Under

Jones v. United States, 179 U.S. 584, 594

the circumstances, to modify the judgment and grant a new trial without error below would be the exercise of a power belonging properly and strictly to a court of original jurisdiction and not to a court of errors. It is submitted that in criminal cases this court and the Circuit Courts of Appeals are courts for the correction of errors exclusively. *Whitworth* v. *United States*, 114 Fed. 302, 304.

Supplementing these suggestions which may probably be deemed wholly sufficient to dispose of this point, it may be interesting to consider the condition of the law as to the right to plead in criminal cases and particularly in misdemeanors. At common law there was no right to plead over in any case involving a charge of misdemeanor. *Heike* v. *United States*, 217 U. S. 423, 430. Under this rule, a defendant could not plead over when a demurrer to his plea in bar was sustained (*Commonwealth* v. *Golding*, 14 Gray 49; *The State* v. *Epps*, 36 Tenn. 552, 554; *Reg.* v. *Strahan*, 7 Cox C. C. 85, 86; *Reg.* v. *Goddard*, 2 Ld. Ray. 920, 922; *The King* v. *Taylor*, 3 B. & C. 502; *Reg.* v. *Faderman*, 4 Cox C. C. 359, 382; *United States* v. *Watkins*, 3 Cranch C. C. 441, 551; 12 Cyc. 362; Chitty, Crim. Law, vol. I, p. 442; Colby, Crim. Law, vol. I, p. 277; Archbold, Crim. Prac. & Pl. vol. I, [Pomeroy's 8th ed.], *p. 116), and logically the same reasons would apply and control if the demurrer was overruled and the plea held sufficient in law. In any event, however, even where the strict rules of the common law have been relaxed, most of the cases hold that it is wholly a matter of discretion in the trial court whether to permit an accused to plead over in misdemeanor cases

(*Evans* v. *Commonwealth*, 3 Metc. 453, 457; *Commonwealth* v. *McGovern*, 10 Allen, 193, 194; *Commonwealth* v. *McCormack*, 126 Mass. 258; *State* v. *Wilkins*, 17 Vt. 151, 157; *Reg.* v. *Strahan*, *supra*); but no decision has ever intimated that it was error not to grant leave to plead over when no request or motion so to plead over had been made in the trial court. *State* v. *The Passaic County Agricultural Society*, 54 N. J. L. 260, 262; *United States* v. *Quinn*, 8 Blatchf. 48, 67. In *The People* v. *Taylor*, 3 Denio 91, the New York law upon the subject was discussed by Chief Justice Bronson, and it was held that in cases of misdemeanor it was doubtful whether the favor of pleading over should be granted, the distinguished Chief Justice adding (p. 98):

> "But if it may be granted by the court of original jurisdiction on overruling the defendant's demurrer, that does not prove that the same thing can be done by a court of review, on a writ of error. There is no precedent for it; and we do not feel at liberty to make one."

See also *Commonwealth* v. *Inhabitants of Gloucester*, 110 Mass. 491, 496.

Moreover, even if the government had requested leave to plead over and the trial court, in the exercise of its discretion, had refused to grant it leave, the ruling, as it involved a matter of discretion, would not be reviewable in this court unless a clear case of abuse of discretion were shown. *Isaacs* v. *United States*, 159 U. S. 487, 489; *Goldsby* v. *United States*, 160 U. S. 70, 74.

CONCLUSION.

For the foregoing reasons, the judgment below should be affirmed on the ground that the trial court committed no error.

Washington, November 3, 1910.

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WILLIAM D. GUTHRIE,
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WILLIAM C. OSBORN,
Of Counsel for defendant Kissel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 390.

Office Supreme Court, U.S.
FILED.
NOV 18 1910
JAMES H. McKENNEY
Clerk

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GUSTAV E. KISSEL AND THOMAS B. HARNED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MEMORANDUM IN REPLY TO SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

WASHINGTON, NOVEMBER 17, 1910.

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THE UNITED STATES, Plaintiff in error,

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MEMORANDUM IN REPLY TO SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

As the principal brief filed on behalf of the United States was wholly silent upon the subject of the four counts purporting to charge the crime of monopolizing (numbers 2, 6, 10 and 14), and the four counts purporting to charge the crime of attempting to monopolize (numbers 3, 7, 11 and 14), these counts were not discussed in the briefs filed by the defendants in error, except in the statement at page 14 of the principal brief, that it was quite apparent upon the barest inspection of the indictment that it did not aver any facts which would suffice to charge the commission of the crime of either monopolizing or attempting to monopolize at any date within the three years prior to the finding of the indictment. Since the government now suggests that these crimes are duly charged to have been committed within the three years,

it becomes necessary to differentiate the conspiracy counts from those charging the crimes of monopolizing and attempting to monopolize.

At the outset, however, it is proper to emphasize, as to all classes of counts, the settled rule, expressly conceded by the government, that "time is not a material element of the offense, and the Government can prove upon the trial that . . . the specific acts alleged occurred at other times than those declared in the indictment." Supp. brief U.S. p. 43; see also *Ledbetter* v. *United States*, 170 U. S. 606, 612; *Lorenz* v. *United States*, 24 App. D. C. 337, 387; *United States* v. *Potter*, 56 Fed. 83, 95. If it were otherwise, as urged in our principal brief (pp. 100–106), the result would be, in almost all cases, to deprive the accused of the right to plead in bar at all, whether the plea were limitation or the similar defenses of jeopardy, immunity and pardon.

As Starkie in his Criminal Pleading (1st Am. ed., pp. 66–67) says:

> "But though time must always be alleged in pleading every material fact, it is never necessary to prove the allegation, unless time be a material ingredient in the offense. So that an overt act of treason may be proved to have been committed on a day different from that laid in the indictment.
>
> "And therefore, upon a second indictment, *the defendant may, by proper averments, show that he has been already acquitted* of that offense upon the first, *though the two indictments allege the offense to have been committed on different days;* for it would be hard indeed if the prosecutor might vary from the day laid in the indictment for the purpose of conviction, and the prisoner could not do the same in order to show a previous acquittal."

And again (at p. 360):

> "Thus, if he be acquitted upon an indictment charging the commission of a murder on the 1st day of March, in the *10th* year of the king's reign, and he be afterwards indicted for a murder alleged to have been perpetrated on the 1st day of March, in the *12th* year of the same reign, he may plead *auter-foits acquit*, alleging the supposed offence to be the same."

It is also important to emphasize that section 1044 of the Revised Statutes prescribes a uniform rule as to all offenses committed against the United States, and extends amnesty for all criminal acts done prior to the three years, whatever may be the nature of the crime, excepting only the capital offense of wilful murder (sec. 1043). So far, therefore, as the defendants are alleged to have committed any offenses, continuous or non-continuous, prior to July 1, 1906, they can not be now prosecuted or punished for them. Their acts, prior to that date, are covered by the statutory amnesty as fully as though they had never been committed.

In the final analysis, the only question before the court is whether the special pleas are sufficient in law to present the defense of the limitation and whether the court below was right in overruling the demurrer of the United States.

I.

As to the counts charging monopolizing or attempting to monopolize.

The monopoly counts attempt to charge the offense of monopolizing by a naked reference to the averments of the conspiracy counts. If we assume everything possible in favor of this novel method of pleading—if we assume

that conspiracy is a continuous offense, that the *continuando* is proper, and that the overt acts are to be given the fullest effect—nevertheless the monopoly counts fail to show or charge the actual commission of the offense within the three years, because they show at best only (1) that the defendants from December 30, 1903, up to July 1, 1909, were continuously conspiring; (2) that in pursuance of the conspiracy they made the agreement of December 30, 1903; (3) that immediately they procured a vote of the directors of the Pennsylvania Company to refrain from carrying on business until the further order of the Board, and (4) that within the three years period they did certain overt acts. The allegation that the defendants continuously conspired is, of course, not at all equivalent to an allegation that they continuously monopolized. Even if conspiracy be a continuing offense, and it be possible to conspire continuously, it is still entirely possible for parties to be continually conspiring to monopolize without ever monopolizing. The *continuando* in the conspiracy counts cannot, therefore, be of any aid to the monopoly counts.

An agreement to monopolize would not of itself constitute the offense of monopolizing unless the object of the conspiracy was alleged to have been effected. Thus, assuming that it were duly alleged that, during the three years prior to the finding of this indictment, the parties had renewed the alleged conspiracy and had done the alleged overt acts in 1907 and 1909. These averments would wholly fail to establish that at any time within the three years the defendants had actually monopolized trade or commerce in raw or refined sugar. The allega-

tion of the indictment that the overt acts committed within the three years were done to effect the object of the original conspiracy, even if this were not merely the pleader's conclusion, would not show that the object of the conspiracy had been actually effected or that a monopoly had been actually established or continued or maintained.

The *continuando* means no more than that the original plot was in *existence* within the statutory period, namely, that the defendants were *of the same mind* in 1906 as they were in 1903, or, in other words, that their *intent was the same* at all times after December 30, 1903. But since the law does not punish intent, it is obvious that this indictment must fail unless there can be found in it some allegation, in addition to the *continuando*, of *an act done within the three years*, and this allegation must be found in the *charging part* of the indictment, for nothing is better settled than that recourse cannot be had to the overt acts to eke out or supplement otherwise inadequate averments descriptive of the conspiracy intended to be charged. *United States* v. *Britton*, 108 U. S. 199, 205.

So, also, as to the counts charging attempts to monopolize. It seems almost preposterous to urge that this offense could be committed and continued six years by simply engaging in a conspiracy and then doing nothing or the trivial and colorless acts alleged to have been done in 1907 and 1909. As Mr. Justice Holmes said in *Northern Securities Co.* v. *United States*, 193 U. S. at p. 409:

> "Not every act done in furtherance of an unlawful end is an attempt or contrary to the law. There

> must be a certain nearness to the result. It is a question of proximity and degree. *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267, 272."

The government in its supplemental brief asserts (p. 38) that "it is expressly averred in these several counts that this monopoly continued during the entire six years previous to the finding of the indictment." This statement the learned Assistant Attorney General sought to support by a reference to the allegations of the charging part of the counts under consideration.

An inspection of the indictment itself will render patent the error of this contention, for the charging part of these counts is that the defendants (p. 18)—

> "... in and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions, there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy in said first count set forth, unlawfully have knowingly and corruptly monopolized a part of the trade and commerce among the several states, to wit," etc.

As to this curious form of averment, it is to be observed, in the first place, that it does not directly charge that the defendants did monopolize or attempt to monopolize, but merely states the pleader's conclusion that in and by the doing of the acts referred to, the accused committed these offences. It is settled by the decisions of this court that such an averment lends no additional force to the facts directly averred, and that unless those facts establish the commission of the offense, and include every element of the offense, the indictment will not be

permitted to stand. In *Pettibone* v. *United States*, 148 U. S. 197, an indictment, which failed to set forth one of the essential elements of the offence, was sought to be supported by a conclusion substantially in the form now before the court. The averment read as follows (p. 201):

> "And so the grand jurors aforesaid, upon their oaths aforesaid, do charge and say" that the said defendants (naming them) "at the said Shoshone County, within the said Northern Division of the District of Idaho, did, on the 11th day of July, 1892, unlawfully, wilfully, fraudulently, and feloniously conspire, combine, confederate, and agree together to commit an offence against the United States, to-wit, to corruptly and by force and threats obstruct and impede the due administration of justice in the aforesaid United States Circuit Court for the Ninth Judicial Circuit, District of Idaho, and did, thereafter, on the 12th day of July, 1892, in pursuance of said unlawful and malicious combination and conspiracy, unlawfully, wilfully, and feloniously, in the manner and form aforesaid, corruptly and by force and threats of violence obstruct and impede the due administration of justice in the aforesaid United States Circuit Court."

The court dismissed the argument that this sufficed to supply omissions in the allegations of fact, in the following words (p. 203):

> "This indictment does not in terms aver that it was the purpose of the conspiracy to violate the injunction referred to, or to impede or obstruct the due administration of justice in the Circuit Court; but it states, as a legal conclusion from the previous allegations, that the defendants conspired so to obstruct or impede."

Moreover, it is to be noted that the indictment in the case at bar does not even state as a conclusion of law that

the offense of monopolizing was committed at any particular time. Giving the allegation the utmost effect, it avers that by the doing of a variety of acts at different times, the defendants have at some *unspecified* time committed the offense of monopolizing or attempting to monopolize. Certainly, it would require a repudiation of all the time-honored principles of criminal pleading to construe this into an averment that the offense was committed at some *particular time within the period of limitation*; for this would be to fritter away the constitutional provision that no person shall be held to answer except upon the indictment as it was found by the grand jury (*Ex parte Bain*, 121 U. S. 1), and it has been held repeatedly that this may not be done by process of construction. See p. 85 of our principal brief. The extent to which the court has discountenanced this doctrine is strikingly illustrated by the decision in *United States* v. *Simmons*, 96 U. S. 360, 363, which is discussed at page 87 of our principal brief.

The offense of monopolizing within three years prior to the finding of the indictment cannot be spelled out of this indictment, for that offense is not properly averred in any count. Mr. Justice Jackson as Circuit Judge in the case of *In re Greene*, 52 Fed. 104, 111, *discussing an indictment under the Sherman Act*, used the following language:

> "But the act does not undertake to define what constitutes a contract, combination or conspiracy in restraint of trade, and recourse must therefore be had to the common law for the proper definition of these general terms, and to ascertain whether the acts charged come within the statute. We regard it as well settled by the authorities that an indictment, following simply the language of the act, would be

wholly insufficient, for the reason that the words of the statute do not of themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense intended to be punished. *U. S.* v. *Cruikshank*, 92 U. S. 542; *U. S.* v. *Simmonds*, 96 U. S. 360; *U. S.* v. *Caroll*, 105 U. S. 611; *U. S* v. *Britton*, 107 U. S. 655; 2 Sup. Ct. Rep. 512; *U. S.* v. *Trumbull*, 46 Fed. Rep. 755.

"Under the principle established by those cases, the several counts of the present indictment must be tested, not by the general recitals and averments thereof, although in the words of the statutes, but by the specific acts or particular facts, which are alleged to have been actually done and committed by the accused. If the particular acts or facts charged do not, as a matter of law, constitute contracts, combinations, or conspiracies in restraint of trade and commerce among the several states, or a monopoly or attempt to monopolize any part of such trade or commerce, no amount or averments and allegations that the accused 'engaged in a combination' or 'made contracts in restraint' of such trade or commerce, or 'monopolized' or 'attempted to monopolize' the same, will avail to sustain the indictment. Whether the accused is charged with an offense is to be determined by the particular acts or facts set forth, and not by the conclusions of the pleader, although asserted in the words of the statute: 'Every offense consists of certain acts done or omitted under certain circumstances, and in the indictment for the offense it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth.' *U. S.* v. *Cruikshank*, 92 U. S. 542, 563."

In order that the acts charged in an indictment shall suffice to establish the actual commission of the offense within the period of limitation, they must, of course, be such as, if proved, would warrant the jury in finding that the offense had been committed within that period. It is not enough that they charge an offense committed at a

prior period. To constitute a sufficient averment of the commission of the offenses within the period, there must be allegations of acts of monopoly within the period, or allegations that acts constituting a monopoly, which were previously performed, were continued within the period of the limitation.

The only acts alleged to have been performed at any time having a tendency to create a monopoly were (1) the making of the contract of December 30, 1903, whereby it was agreed that the control of the majority of the stock of the Pennsylvania Company should be vested in the American Company during the period of the agreement, and (2) the acts performed on the same day in pursuance of that contract. It nowhere appears in the indictment that the voting power upon the stock was ever exercised; it nowhere appears that the stock was ever transferred or the proxy renewed; it nowhere appears that the control of the board of directors was ever actually vested in the American Company, and it nowhere appears that the defendants carried out the purpose which is attributed to them of continuing their control of the 26,000 shares of stock beyond the period provided for in the contract. It is entirely consistent with every averment of the indictment that the control of the stock itself and of the voting power upon it, was returned to Mr. Segal long prior to July 1, 1906. The utmost that could be spelled out of the indictment by process of inference would be that the agreement of December 30, 1903, was continued in force for the time provided therein, namely, one year. Certainly, an allegation that it was intended by the defendants that they would extend the life of that agree-

ment by preventing Segal from complying with the conditions to be performed by him is not the equivalent of an allegation that they succeeded in carrying out their intention, or that Segal was not able to, and did not at or before the maturity of the loan, pay it off and repossess himself of the stock.

In the original brief filed on behalf of the government, there appears, at page 36, the statement that the proxy given Kissel to vote a majority of the stock of the Pennsylvania Company was "irrevocable." But it is to be noted that the proxy itself provided that it is to be "irrevocable" merely *pending the life of the agreement made on the same day* (rec. p. 10). Therefore, the right of the American Company to exercise voting power on the stock must be presumed to have come to an end at the latest in January, 1905, irrespective of the provisions of the Pennsylvania statute referred to in our original brief at page 98, and irrespective of the decisions of the Pennsylvania courts to the effect that the right to vote by proxy is not a common law right, and is to be exercised only in accordance with special authority (*Craig* v. *First Presbyterian Church*, 88 Pa. St. 42, 47 *Commonwealth* v. *Bringhurst*, 103 Pa. St. 134, 137), and irrespective of the authorities in Pennsylvania and elsewhere that a proxy coupled with an interest is none the less revocable under the provisions of a statute of this character. *Vanderbilt* v. *Bennett*, 6 Pa. Cy. Cts. Reps. 193, 203; *Matter of Germicide Co.*, 65 Hun 606.

As to the resolution of the board of directors in pursuance of the contract of December 30th, 1903, it is to be observed that it is nowhere alleged that that act was fol-

lowed by the actual closing of the refinery or suspension of business on the part of the Pennsylvania Company. However effective such resolution might be to establish an attempt to monopolize committed upon the day of its passage, namely, December 30th, 1903, the mere resolution could not constitute the substantive offense of monopolizing at any time and could not involve an attempt to monopolize at any period later than the date of its adoption. Moreover, it appears by the very terms of the resolution that it was subject to contrary order of the board at any time (rec. p. 11), and there is, of course, no principle of law or evidence upon which an act of this character, which is not in its nature continuing and which by its terms is subject to immediate termination, can be presumed in a criminal case to have continued for several years, or for any definite period. Furthermore, as we have already pointed out, there is no allegation in the indictment that the resolution was ever acted upon, or that it was in force as late as July 1, 1906, or that with or without its rescission the Pennsylvania Company did not engage in business in competition with the American Company long prior to July 1, 1906, or that during the period beginning July 1, 1906, the Pennsylvania Company was not in active competition with the American Company, or that the American Company or anybody acting for it, or in its behalf, or any of the defendants, did any act after July 1, 1906, to prevent the Pennsylvania Company from engaging in competition with it. The statement in the government's original brief (at pp. 36–37), that the resolution to close the refinery "continued unrevoked and effective" is nowhere to be found in the indictment. The allegations of

acts which occurred within the period beginning July 1, 1906, need only be examined to convince the court of the sheer absurdity of the contention that the indictment charges the commission of any act of monopoly or the continuance of a monopoly or an attempt to monopolize within the three years' period. The sufficiency of the indictment is to be tested "by the specific acts or particular facts, which are alleged to have been actually done and committed by the accused" within the period and "if the particular acts or facts charged do not, as a matter of law, constitute . . . a monopoly or attempt to monopolize any part of such trade or commerce, no amount of averments and allegations that the accused . . . . monopolized or attempted to monopolize the same, will avail to sustain the indictment." *United States* v. *Greene*, *supra*. The averment contained within the matters of inducement in the conspiracy count, that the Pennsylvania Company "throughout the remainder of said period would so have carried on said business, trade, and commerce, if it had not been for the unlawful and corrupt conduct . . . which is now to be described" (rec. p. 4), is a conclusion and plainly insufficient. According to the established principles of criminal pleading, facts must be averred, and they must be averred directly (see authorities in principal brief, p. 85). The allegation now before the court is not the equivalent of a direct averment that at any particular time subsequent to July 1, 1906, the Pennsylvania Company did not carry on its business, and certainly it cannot be held that it is the equivalent of a direct averment that throughout said period it did not do so. *United States* v. *Simmons*, 96 U. S. 360, 363.

And finally it is to be observed that the learned Assistant Attorney General has inadvertently been led to an over-statement of the contents of the indictment, and that throughout the supplemental brief will be found statements which the indictment itself will not bear out. For example, on page 35 of the supplemental brief on behalf of the United States, the following is urged upon the court:

> "Suppose, as is alleged, this company, by obtaining complete control of the Pennsylvania company in the manner alleged, acquired an entire monopoly of the sugar-refining business in the United States, and by the American company's still holding the control of the Pennsylvania company by virtue of the four directors who were elected at the instance of the American company, and who were subservient to its wishes, and by the order of such directors made December 30, 1903, remaining unrevoked, the Pennsylvania company was continuously kept out of business, and thereby the monopoly was continued in favor of the American company. Could it be doubted that at every moment such condition existed the American company was *monopolizing* the sugar business, just as much as it was the moment it first, by the method declared, shut down the operation of the Philadelphia refinery?"

As matter of fact, it is not alleged in the indictment that the American Company acquired an entire monopoly of the sugar-refining business in the United States; nor is it alleged that the control of the Pennsylvania Company by the American was continued by the election of four directors, or otherwise; nor is it alleged that four directors were elected at the instance of the American company who were to be subservient to its wishes; nor is it alleged that the order of *such* directors made December 30th, 1903, remained unrevoked, or that

the order by whomsoever made remained unrevoked; nor is it alleged that the Pennsylvania Company was continuously kept out of business; nor is it alleged that thereby the monopoly was continued in favor of the American Company; nor is it alleged that the operation of the Philadelphia refinery was shut down during *any* period whatever and, *a fortiori*, it is not alleged that it was shut down at any period subsequent to July 1, 1906. We may, therefore, appreciate the full import of the statement of the learned Assistant Attorney-General on the oral argument that the indictment might have been better drawn; but that view can hardly warrant or excuse the inclusion in his brief of facts not to be found in the record, which may, for all that appears, be entirely unfounded and contrary to the truth. As Chief Justice Marshall said in *United States* v. *Wilson*, 7 Pet. 150, 161:

> "The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages."

Again, at page 37 of the supplemental brief, the statement will be found that "Kissel procured the election of the four directors who were subservient to the American company," although there is no allegation in the indictment that anything of the kind ever happened. It is then added on the same page that the order of the board of directors in which Kissel participated "put and held" the company out of competition with the American company, although this is without support of any statement in

the indictment. It is then further stated, on page 38, that "it is expressly averred in these several counts that this monopoly continued during the entire six years previous to the finding of the indictment," although, as stated above, the indictment contains neither any such express averment nor any averment that remotely implies or approximates it. So also, in the government's original brief, p. 10, it is suggested, if not asserted, that the Pennsylvania Company went into a receiver's hands on October 2, 1906, "as a natural result" of the defendants' conduct, though the only averment in the record is directly to the contrary. The special plea in bar of the defendant Kissel expressly alleges that he "was not a party to and did not participate in the said action or in said proceeding for the appointment of a receiver, and did not, directly or indirectly, procure, induce, counsel, advise, aid or abet the institution of the said action, the appointment of the said receiver, or the making of said orders, Exhibit A" (rec. p. 33). This was admitted by the demurrer of the United States.

II.

As to the conspiracy counts.

The government advances in its supplemental brief (p. 25), for the first time, the proposition that the Sherman Act is to be interpreted upon the assumption that to *engage in a conspiracy* under section 1 constitutes an offense entirely different from the offense *to conspire* under section 2, and that the former means to be engaged in consummating the object of a conspiracy as

distinguished from the act of joining in a conspiracy or of entering into an agreement or combination.

The verb "to conspire" frequently has been used by Congress in defining offenses of conspiracy; *e. g.*, sections 5440 and 5508, and it is firmly established that this consists of the agreement or plot or meeting of minds and not of any acts done in pursuance of the conspiracy. As the Circuit Court of Appeals, Sixth Circuit, said in *McKenna* v. *United States*, 127 Fed. 88, 90:

> "The gist of the offense defined by the statute is the conspiracy to do the wrongful thing, and not the doing it. Whatever the morality of the actual accomplishment of the purpose of the conspiracy may be, it is not the subject of indictment. The whole body of the crime constituted by this section consists in the formation of the plot."

In Wright's Criminal Conspiracies, page 124, it is said:

> "The conspiracy itself is the crime. It is different from an indictment for stealing, or an action for trespass, where the offense consists of an act done. The devising of means is not a constituent part of the offense, but an act done in pursuance of the original design. *It is not the actual perpetration but the original hatching of the plot which constitutes the offense.*"

See also our principal brief, p. 51 *et seq.*

When, therefore, Congress, used the verb "*to conspire*," it did so in the light of the long-settled rule of the federal courts and of the common law that the crime of conspiracy consisted of the act of agreeing, and that acts done while engaged in consummating or carrying into effect the object of the conspiracy were not a part of the offense. It is hardly reasonable to assume that the wording of section 1, namely, "engage in any such combination or conspiracy,"

was intended to create an entirely different crime, and to provide that the acts done to effect the object of the conspiracy should be the gist or essential element of the offense.

As was pointed out on the oral argument, by a question to the learned Assistant Attorney General, the interpretation advanced by the United States might make the Sherman Act read as if it punished only those who were actually engaged in carrying into effect the object of a conspiracy, and did not punish those who had only agreed to the plot or conspiracy, but had done no overt act. In the government's original brief it is asserted (p. 51) that "the Sherman Act makes a conspiracy in restraint of commerce or to monopolize commerce an offense without the occurrence of even a single overt act." Yet in the supplemental brief (see p. 25) it is contended that Congress contemplated by the words "who shall engage in any such conspiracy" to strike at and punish not the hatching of the plot but the overt acts done in pursuance of it.

Under section 1 of the Sherman Act, the offense is *to make* an agreement or *to engage* in a combination or conspiracy. Congress undoubtedly used the active verbs "to make" and "to engage" in the same general sense, that is, as implying action, just as the verb "to conspire" is an active verb implying action, that is, to plot, to scheme, to join in, to concur. A different thought and a different question would be presented if, instead of using the active form "who shall engage," Congress had used the neuter form "who shall be engaged in" a conspiracy.

When it is said that "a man engages in business," we mean the act of commencing or starting in business as

distinguished from being actually engaged in or carrying on business. When we say that a nation engages in war, we mean that it starts, enters upon, or begins war—a conception entirely different from that expressed by the neuter form that a nation is engaged in war. Again, when we say that a man engages in a copartnership, we mean that he forms or enters into a copartnership, and not that he is engaged in, or is a member of, a copartnership.

It is difficult to conceive that Congress, in prohibiting conspiracies in restraint of trade by section 1 of the Sherman Act, intended to create a kind of conspiracy differing essentially in character from the kind of conspiracy forbidden in section 2. Likewise it is difficult to conceive that Congress, by the use of the words "engage in a conspiracy" in the first section intended to create a continuous crime consisting of the state of "being engaged in" a conspiracy to restrain trade, a crime essentially different in character from the common law crime of conspiracy, while intending by the use of the word "conspire" in the second section to create a conspiracy of the character known to the common law and consisting only of the act of entering into an unlawful combination. It is submitted that there could be no reason for thus creating criminal conspiracies differing essentially as to character, elements and constitution, and that it is apparent upon a reading of the two sections that Congress intended only to create three kinds of crimes, namely, the two substantive crimes of monopolizing and attempting to monopolize, and the crime of conspiring as known to the common law. If Congress had intended by the use of the words "engage in a conspiracy" to provide for elements

of offense wholly different from those of any conspiracy to be found in federal legislation, or indeed in any state legislation, language would have been used definitely expressing this novel idea, so as to indicate plainly that it intended to punish not merely the act of plotting, but the state or condition of being engaged in a conspiracy and doing acts to effect its object.

As to the nature of the offense of conspiracy, it may be added that the following propositions are fully and firmly established by the authorities cited in our principal brief: (1) that a conspiracy is the agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means, and that the crime consists, not of a state or condition of mind or of mere intention, but of the act of agreeing; (2) that whenever and wherever that act is performed or renewed, the crime is committed; (3) that the fact that the same parties have antecedently made a similar agreement to effect the same object renders the new agreement none the less a new offense; (4) that the act of agreeing is ordinarily established circumstantially by proof of concurrent acts, and from this proof the making of the agreement may be deduced; (5) that the ultimate fact to be found by the jury is the making of the agreement, and it is that act, and not the acts from which the agreement is deduced, that constitutes the offense, and (6) that the statute begins to run in conspiracy, as in every other crime, from the date when the offense is actually completed.

A continuous crime is one that contemplates duration, lapse of time, or course of conduct however short or long, and this fact of duration is an essential element of the

offense and constitutes the gist or gravamen of the offense. A non-continuous offense, however, is one that may be committed without perceptible lapse of time, and in which the essential act constituting the gist or gravamen of the offense may be performed by one act, such as agreeing, or, as the scholars put it, that may be committed at one stroke, in one breath, *uno ictu*, *uno flatu*.

Familiar examples of continuous, as distinguished from non-continuous offenses, will be found in the offenses of cohabitation as distinguished from bigamy, of maintaining a nuisance as distinguished from erecting a nuisance, of carrying on business without a license as distinguished from selling without a license, of keeping a gambling house as distinguished from gambling. As Mr. Justice Blatchford said in the case of *In re Snow*, 120 U. S. 274, 281, speaking of the offense of unlawful cohabitation:

> "It is, inherently, a continuous offense, having duration; and not an offense consisting of an isolated act."

An indictment for crime should lay the offense as actually committed within the limitation and in conspiracy cases should allege the conspiracy as having been found or entered into within the limitation. It involves a misconception of the law, and, hence, it is bad pleading to charge in an omnibus indictment a number of different conspiracies committed at different times under the guise of a single continuing offense. *Commonwealth* v. *Bartilson*, 85 Pa. St. 482, 486; *United States* v. *Biggs*, 157 Fed. 264.

In the recent *Barber* case (No. 444), the government adopted the view that each overt act in furtherance of

a conspiracy constitutes a new offense (see supplemental brief in that case, pp. 58–60), though it declines to accept the consequences of that doctrine, and has called attention to certain of the attributes of conspiracy which it conceives to be inconsistent with the view that a renewal of the conspiracy constitutes a separate offense and not the continuance of the old offense. Thus, upon the argument of the case at bar, it was asserted by the learned Assistant Attorney General that a conspiracy might be prosecuted wherever an overt act was committed. The authorities, however, show that a conspiracy is indictable where an overt act is performed, not upon the ground that the overt act was *in furtherance of an antecedent conspiracy*, but solely on the ground that the overt act is evidence of the commission of the crime of conspiring within the jurisdiction. The authorities are quite clear that it is the crime actually committed in the new jurisdiction that is the subject of prosecution, and not the antecedent crime of conspiracy committed elsewhere and transferred to that jurisdiction through the performance of an overt act.

Thus, in *Noyes* v. *The State*, 41 N. J. L. 418, where it was held that although the conspiracy had originally been formed in New York, an indictment would lie for a conspiracy to the same end in New Jersey, the jurisdiction of New Jersey was sustained only because the acts done in New Jersey by the *defendant Noyes* were done with the co-operation of a co-conspirator acting through innocent agents in New Jersey. The court said (p. 424):

> "By the application of this established rule, it appears impossible to avoid the result that, as an in-

> tendment of law, the act of changing the possession of this property from the company to the defendant, Noyes, was the *joint act* of such defendant, and of Mr. Stedwell, who is also a defendant, and that by such joint act the conspiracy was *renewed* and partly executed in this state, in the county of Essex, and . . . thus *this* crime became cognizable by the courts of that locality."

The same reasoning seems to have controlled the court in *Commonwealth* v. *Corlies*, 3 Brewster 575, 577, in which it appears that the jury was instructed that, in order to convict, they must find that there was a conspiracy formed within the jurisdiction between two or more persons, or they must acquit the defendant.

In *King* v. *Brisac*, 4 East 164, which is probably the case most frequently cited with regard to the jurisdiction to prosecute at the place where an overt act is performed, the court discussed a prior unreported case of *King* v. *Bowes and ors.*, in which it had been held that though the acts of some of the conspirators were confined to other counties than Middlesex, the conspiracy might be prosecuted in that county by reason of the fact that acts had been done by the conspirators on trial in the prosecution of the conspiracy in that county; but the court held specifically that it was not necessary to adopt even that view for the purposes of the case before it, since the defendants had committed a substantive offense within the county.

The principle is made clear by the decision in the case of *People* v. *Mather*, 4 Wend. 229. As has been pointed out in our original brief (at pp. 77, 78), the indictment in that case was for the renewal of a conspiracy in a different county from that in which the plot had originally been hatched, and it charged a new offense

in that county at the time of the renewal. The reasoning of the case is consistent only with the theory of renewability by *acts* done within the jurisdiction where the *venue* is laid.

Moreover, it must be manifest that conspiracies, under the statutes of the United States, may not be prosecuted in a jurisdiction where an overt act was performed unless the conspiracy was also formed in that district. By the unbroken line of authorities hitherto referred to (see pp. 52–53 of our original brief), it is established that the overt act performed in pursuance of a criminal conspiracy constitutes no part of the offense; and the Constitution forbids that a crime be prosecuted save in the district or districts in which it is committed. Hence, it would be clearly violative of constitutional rights to prosecute in a district other than that in which the conspiracy was formed, simply because an overt act was performed in that other district.

But while this constitutional provision forbids that a conspiracy be prosecuted in a district other than that in which it was formed upon the basis of the performance of an overt act in the other district, it does not forbid prosecution in that other district of any conspiracy formed or renewed to further the same end as the antecedent one. Therefore, when a corrupt agreement has been entered into in one district, and subsequently one or more of the parties to that agreement participate in an act in another district, and there is thus evidence to support the conclusion that in that new district they have again conspired, this act of conspiring may be prosecuted in that new district. In such case, however, the indictment must be founded upon a conspiracy formed in the new district.

In *Hyde* v. *Shine*, 199 U. S. 62, 76, the question as to the right to prosecute a conspiracy in the district in which the overt act was performed, although the defendants were not there at the time, was a subject of discussion, but the prevailing opinion dismissed the point with the statement—

> "As the indictment in this case charges that the conspiracy was entered into in the city of Washington, it becomes unnecessary to consider whether an indictment will lie within the jurisdiction where the overt act was committed, though there are many authorities to that effect."

The dissenting opinion filed by Mr. Justice Peckham, with the concurrence of Mr. Justice White and Mr. Justice McKenna, states the following (p. 85):

> "The indictment avers that the conspiracy was entered into in Washington, District of Columbia, on December 30, 1901, *and the opinion holds, in substance* (*and rightly, as I think*), *that it is essential to aver its formation in the District in order to give the courts therein jurisdiction of the offense.*"

And further that (p. 87):

> "If defendants were not then there," (in the district where the conspiracy was formed at the time of its formation), "they could not be guilty of the crime charged in the indictment."

The learned Assistant Attorney General has also invoked the rule of evidence that when a conspiracy is established the acts of each of the conspirators become the acts of all, and he has argued that this rule is inconsistent with the doctrine that conspiracy is an instantaneous and not a continuing offense. This argument, as we think, misconceives the purpose and scope of the rule which it invokes. The formation and nature of the agree-

ment may be proved in a criminal case through the character of the concurrent acts, and, in consequence, evidence of those acts is admissible to establish the formation of the conspiracy just as similar evidence is admissible to prove the participation of two or more persons as principals or accessories in the commission of any other offense. The evidence is admitted in accordance with the ordinary rules applicable to the proof of an ultimate fact through other facts, and the rule invoked is a mere commonplace of the law of evidence applicable to criminal cases. In civil cases, however, where actual damage is of the gist or gravamen of the cause of action, the acts of any conspirator are admissible, after due proof of the conspiracy, to prove the injury actually done and the damage sustained.

The rule that, after the conspiracy is proved, the act of each conspirator is the act of all, is merely the rule of agency which is applicable to the prosecution of substantive offenses committed jointly by several confederates, and relates to prosecutions for the substantive offenses which may be the object of a conspiracy rather than to prosecution for the crime of conspiring. For, in conspiracy, it is immaterial whether any acts subsequent to the agreement are performed and, hence, it is immaterial to the determination of their criminal responsibility for the conspiracy, whether those who do not perform any acts in furtherance of the agreement are responsible for the acts performed by others.

III.

As to the sufficiency of the pleas.

It seems to be the contention of the government that if the pleas in bar now before the court had simply set up the defense of the limitation in the language of the statute and had stopped there, the pleas would have been good; but that they were vitiated and turned into pleas of the general issue simply because the averment that the offenses charged in the indictment had not been committed within the three years was supplemented by allegations that the alleged overt acts were not done to effect the object of the original conspiracy. It must be obvious that if it is now to be declared as law that the allegation of time or the allegation that overt acts were done by one or more of the alleged conspirators *in order to effect the object of the conspiracy* could not be traversed by a plea in bar, an accused could readily and always be deprived of the right to plead in bar in conspiracy cases, and thus this substantial and vital privilege would be frittered away and nullified by the mere device or artifice of making averments in the indictment which the prosecution would not have to prove at all, by which it would not in any sense or way be held or bound, and which it could wholly repudiate or disregard on the trial as mere surplusage. See Starkie's Crim. Plead. quoted *supra*.

As shown in our original brief, the allegations of overt acts and of time are immaterial. They constitute no essential part of the indictment, and a denial of such allegations does not vitiate a plea in bar otherwise good or create or tender any real issue. Such a denial cannot in

effect transform a plea setting up solely the defense of the limitation into the equivalent of a plea of not guilty.

In order to save this indictment, the government asks the court to disregard or abrogate the ordinary rules of pleading in conspiracy cases, and to treat this case as exceptional. Thus, it is asserted on page 25 of the supplemental brief as follows:

> "The feature of these counts which is especially important, and to which the court's attention is particularly called, is that the offense charged in each count is *not the formation* of a conspiracy, *but the engaging in the conspiracy described* for the purposes alleged, by the doing of the particular acts described. The overt acts set forth do not bear the same relation to the offenses for which defendants are here indicted, as such acts do to an ordinary conspiracy. They are here alleged as constituting elements of the offense, and not as incidents growing out out of the offense of conspiring; that is, it was by and in the commission of these several acts that defendants engaged in the conspiracy."

But at page 42 of the supplemental brief, the government asserts in one paragraph that "it is unnecessary to set forth in the indictment any overt act; and that in case such acts are alleged, it is equally unnecessary that they be proved, and that they may be treated as surplusage," and in another paragraph it asserts that "it necessarily follows as a corollary of this principle that the essential allegations of the indictment may be supported by proof of overt acts entirely independent of and different from those which are particularly set forth in the indictment, and consequently, that in making out the offense charged in the present indictment

against Kissel and Harned, the Government cannot be confined to proof of the particular facts alleged as overt acts, but may prove any specific acts in addition thereto or independent thereof."

Thus, the government in one breath (p. 25) urges that the allegations of overt acts are to be treated as essential elements of the offense for the purpose of depriving the accused of the right to plead in bar, and in another breath (p. 42) insists that they may be treated as mere surplusage for the purpose of conviction on the merits. Such a contention need only be appreciated to refute itself.

The suggestion is made in one form or another that the court below treated the pleas as demurrers and held that the indictment was fatally defective. As the United States had demurred to the plea, the settled rule of pleading (original brief, p. 15) that a demurrer searches the whole record and seeks the first error became applicable. But, as matter of fact, the court did not hold the indictment bad on its face as not charging the commission of any offenses under the Sherman Act. All that the court held was that it did not appear on the record before it that any of the alleged offenses had been actually committed within the three years before the finding of the indictment. The United States by its demurrer submitted to the court the question whether, on the face of the pleadings, it appeared that the offenses had been committed within the three years. The attempt to limit and confine a plea in bar to the function of a demurrer disregards the fundamental difference between a special plea and a demurrer, and would wholly remove

any necessity for such a plea. The reason why pleas are allowed is that they present facts which do not properly appear on the face of an indictment or declaration, or which involve matters not necessary to be alleged by way of anticipation. Thus, in *United States* v. *Cook*, 17 Wall. 168, 179, the court held that the defense of the limitation could not be availed of under a demurrer, although it might appear on the face of the indictment that more than three years had elapsed since the commission of the offense, for the reason that it might well be that the statute of limitations did not apply because the accused had been a fugitive from justice, and that the prosecution ought, therefore, to have the opportunity to show that fact. The filing of a special plea in bar instead of a demurrer gave the government the fullest opportunity to show that the accused came within the exception. The government now urges that to allow the plea to be treated as a demurrer to the indictment would be to circumvent the rule declared in the *Cook* case and thus to do indirectly what could not be done directly. But the reason of the rule does not apply in the case at bar. The defendants duly set forth in their pleas that they had not been fugitives from justice (rec. pp. 34 and 53); and the United States by admitting this allegation instead of filing a replication elected to submit to the court the question of law whether it did or did not appear on the whole record that the offenses were committed within three years. The government had the right to show every fact not alleged in the pleas and advisedly waived that right. How then can it seriously claim that it was deprived of the right secured to it under the rule in the *Cook* case?

As the special pleas in bar presented the single issue and the single defense of the limitation, they are sufficient in law for that purpose, and are not vitiated or rendered equivalent to the general issue by the additional averments. *Patchen* v. *Sprague*, 2 Johns. 462, 466.

CONCLUSION.

It is, therefore, submitted that whether the several offenses charged in this indictment be regarded as continuous or non-continuous, the court below did not err in holding that the pleas were sufficient in law to present the single defense of the limitation, in overruling the demurrer and in awarding judgment accordingly, in the absence of any request on the part of the government that it desired to plead over; that no other judgment could have been properly directed as the United States remained silent and stood on its demurrer; that the court was not called upon to ask the government if it did not desire to do something else or different, and that in criminal cases, on an appeal of the government, a trial court awarding judgment in favor of the individual ought not to be reversed unless it has committed error. Of course, there can be no error committed in not granting what was not asked for. As the Circuit Court of Appeals, Ninth Circuit, recently said on a criminal appeal in the case of *Jones* v. *United States*, 179 Fed. 584, 592:

> "In an action at law this court is limited to the correction of the errors of the court below. Questions which were not presented to or decided by that

court are not open for review here because the trial court cannot be guilty of error in a ruling that it has never made upon an issue to which its attention was never called."

Washington, D. C., November 17, 1910.

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Supreme Court of the United States,

OCTOBER TERM, 1910.

No. 390.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GUSTAV E. KISSEL AND THOMAS B. HARNED.

BRIEF SUBMITTED BY LEAVE OF THE COURT ON BEHALF OF MESSRS. THOMAS, DONNER, SENFF, MAYER AND FRAZIER WHO ARE JOINED WITH MESSRS. KISSEL AND HARNED AS DEFENDANTS IN THIS PROSECUTION.

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I.

BY ITS OWN ALLEGATIONS THE INDICTMENT SHOWS THAT THE CONSPIRACY THEREIN DESCRIBED COULD NOT HAVE BEEN IN EXISTENCE AT ANY TIME WITHIN THREE YEARS BEFORE THE INDICTMENT WAS FOUND, ITS OBJECT HAVING BEEN FULLY CONSUMMATED IN DECEMBER, 1903, WHEN, IN CONSEQUENCE OF THE DEFENDANTS' CONDUCT, THE PENNSYLVANIA COMPANY WAS PREVENTED FROM ENGAGING IN THE SUGAR TRADE.

The indictment alleges that the defendants "have engaged" in the conspiracy therein described on the 30th day of December, 1903, "and continuously, and at all times during said period of six years, *to wit*, from that day until, and on, the day of the finding and presentation of this indictment" (Record, p. 5).

The Government seeks to treat the *continuando* as, in effect, an allegation that the conspiracy formed on De-

cember 30, 1903, "was never abandoned, but was in continuous operation thereafter" (United States *v.* Brace, 149 Fed. Rep., 874, 876), and thus ignores the established rule of pleading, that if a crime is non-continuous a *continuando* will not extend its duration (United States *vs.* Irvine, 98 U. S., 450), and is to be rejected as "insensible and surplusage" (Story, *J.*, in United States *v.* La Coste, 2 Mason, 129, 140).

The rule thus ignored, of itself disposes of the Government's contention that conspiracy is a continuing crime. For a crime is continuing only when the act which constitutes its essential element is of a continuous nature. In conspiracy this act is the act of agreeing, and the act of agreeing is as inherently a non-continuing one as the act which constitutes the offense in assault, or arson, or larceny, and continuance is no more to be attributed to it than to the acts which constitute those offenses.

But it is of no legal consequence whether the *continuando* be retained or rejected, for when we examine the averments which describe the scope and purpose of the agreement of December 30, 1903, it becomes at once apparent that that agreement *could not have been in existence at any time within the statutory period*, because by its terms (1) its purpose would have been, and, indeed, is distinctly alleged to have been, *fully accomplished more than five years before this prosecution was begun*, and (2) *it contemplated no further action within that period.*

(*a*) The Pennsylvania Company was not engaged in business at the time the conspiracy was formed, *nor at any time.* This appears affirmatively, for the indictment alleges, in terms, that the company was organized and created and has existed throughout "said period of six years" "for the *purpose* of carrying on business," that on December 30, 1903, it was *"about to,"* and *"intended to"* engage in and carry on "business," and that it *"would have"* done so "if it had not been for the unlawful and corrupt conduct of the" (defendants) "which is now to be described" (Record, p. 4). This is certainly equivalent to a direct averment that the conduct of the defendants resulted in the Pennsylvania Company's exclusion from the sugar trade *at that time.*

The indictment thereupon proceeds to describe the conduct, but for which the company would have be-

come a competitor of the American Company, namely, that the defendants conspired "unreasonably to restrain and eliminate free competition" between the Pennsylvania and American companies *"by and through the* unfair, deceitful, unlawful and corrupt *means and practices* on the part of said corporation and individual defendants, *which are now here described"* (*Id.*, p. 5):

These means and practices are thus "described":

1. The defendants were "to get . . . for said corporation defendant, the possession, use and control of, and the authority to vote" a majority of the Pennsylvania shares, "and thereby secure the *power of control* over and management of" that company "for the term of one year at least," by inducing Segal to borrow from Kissel, the latter acting as a broker, and as the agent of an undisclosed principal, the sum of $1,250,000 *for the term of one year from January 4, 1904*, at six per cent. interest, and to transfer to Kissel, with other security for the repayment of the loan, written authority to exercise the power of voting as a holder of said . . . shares . . . without said Adolph Segal being aware of the fact that said corporation would be the real lender," etc. (*Id.*, pp. 5-6).

2. "*When the power of control over and management* of" the Pennsylvania Company *"should be so acquired* by said defendant corporation *for the term of one year* in the manner aforesaid, said . . . defendants were to use every means in their power to extend said term and said power of control, particularly by keeping said Adolph Segal involved in debt, and his affairs in such a condition as to prevent his relieving himself from his obligations to said corporation, and by wrongfully and arbitrarily refusing to accept payment of such obligations from him, either before or at their maturity, or to surrender to him such power of control over and management of said Pennsylvania Sugar Refining Company" (*Id.*, p. 6).

3. *When such power should be so acquired*, the defendants were *"to make use of the same"* to prevent the Pennsylvania Company from engaging in or carrying on business, and "thereby *to bring about the ruin of said Pennsylvania Sugar Refining Company* through inaction,

and the destruction of its said property and facilities through decay, and *eliminate and entirely prevent the competition* with said corporation defendant which would, but for the acts of said corporation and individual defendants in the premises, come into existence through the operation of said Pennsylvania Sugar Refining Company (*Id.*).

It thus appears that the objects of the conspiracy were:

1. To acquire, by means of the loan transaction, the power of control over and management of the Pennsylvania Company for the term of at least one year from the 4th day of January, 1904.

2. *When such power of control should be so acquired "for the term of one year"* "to use every means in their power to extend said term and said power of control," particularly by keeping Segal involved in debt, and by arbitrarily refusing to accept payment of his obligations "either *before or at their maturity.*"

3. Furthermore, to make use of such control, *when it had been so acquired*, to prevent the Pennsylvania Company from carrying on business, and thereby bring about its ruin through inaction, and the destruction of its property and facilities through decay, and thus eliminate the competition which would otherwise have come into existence.

The first step toward the accomplishment of the alleged agreement, namely, the acquisition of the power of control over and management of the Pennsylvania Company for the term of "one year at least," was to be taken on the 4th day of January, 1904, and it is expressly averred that all of the other contemplated acts were to be committed *when such power of control . . . should be so acquired* (p. 6).

It is obvious that the word "when" is here used in its grammatical sense as an adverb of time, meaning "at the time that," or "as soon as" (City of St. Louis *v.* Withans, 90 Mo., 646; Ware *v.* Lippincott, 10 Atl. Rep., 163; Williams *v.* Washington L. I. Co., 31 Iowa, 541, 544; Strawick *v.* Munhall, 139 Pa., 163). "When" and "upon," referring to the time of performing an act, are substan-

tially synonymous (Womrath *v.* McCormick, 51 Pa. St., 504, 507).

(*b*) The Government asserts that the indictment "charges *explicitly* that the conspiracy had a continuing object, viz., not merely to put the Pennsylvania Company momentarily out of business, . . . but to keep it out of business . . . *permanently*, or, at any rate, as long as possible" (Brief for the United States, p. 33), and in support of this assertion the Government calls attention to the allegation of the Second of the three paragraphs which undertake to describe the scope and purpose of the conspiracy, to the effect that when the defendants had obtained control of the Pennsylvania Company they "were to use every means in their power to *extend said term and said power of control*," &c. But it will be observed that the particular means, and the only means, by which the defendants are alleged to have intended to effect this result are thus specified: (*a*) "by keeping said Segal involved in debt and his affairs in such a condition as to prevent his relieving himself from his *obligations* to said corporation defendant, and" (*b*) "by wrongfully and arbitrarily refusing to accept payment of *such obligations* from him either *before or at* their maturity, or to surrender to him such power of control over and management of said Pennsylvania Sugar Refining Company" (Record, p. 6).

"This," it is argued, "is a charge that the conscious object of the conspiracy was to continue the subjection of the Pennsylvania Company . . . as long as possible."

There are, however, several serious objections to this conclusion. In the first place, we have only to turn to the First Paragraph to see that what are referred to as Segal's "obligations" in the passage above quoted were merely his obligations to pay the principal and interest on his original loan; and since these obligations were to mature on the 4th day of January, 1905, it is plain that any action on the part of the defendants, either to prevent him from meeting these obligations, or in respect of a refusal to accept payment, must take place, as indeed the indictment expressly alleges of the latter, "before or at their maturity," namely, on or before January 4, 1905.

In the second place, a charge of crime must be made directly, and not by implication. Every ingredient must be stated with certainty and precision. Nothing can be taken by inference or intendment (United States *v.* Hess, 124 U. S., 483; Ledbetter *v.* United States, 170 U. S., 606).

In the third place, it is distinctly alleged that the defendants were to make use of their power of control to prevent the Pennsylvania Company from carrying on business *when* that power was acquired. Whatever they might have contemplated doing *after that time,* in the way of keeping Segal involved in debt, or of wrongfully refusing to accept payment from him, however immoral or even illegal under the Pennsylvania or New York laws, would not, in itself, have constituted any violation of the Sherman Act, the Pennsylvania Company being already wholly eliminated as a potential rival of the American Company.

(*c*) But, the Government persists, even though there are no *direct* allegations of a continuing conspiracy, what *is* averred is *equivalent* to "a charge that the conscious object of the conspiracy was *to continue the subjection of the Pennsylvania Company to the American Company as long as possible*"; what the language of the indictment really "*means*," is "that defendants intended and mutually understood that they would keep the Pennsylvania Company out of business," etc. "Indeed," they argue, "any purpose on the part of the conspirators to keep the Pennsylvania Company out of business and competition merely for a moment, and not continuously, would be absurd. It would accomplish none of the *objects which are charged to have been sought.*" (Brief for the United States, p. 35).

These are, however, the only *objects* with which we are concerned, and there is no allegation that the objects so *charged* were to be continued, much less that any *act* toward their accomplishment was to have been committed, at any time within at least five years before the beginning of this prosecution. The exclusion of the Pennsylvania Company from business, and its consequent ruin, were to be brought about *when* the defendants obtained control, and *that,* as we have seen, is alleged to have been *done at the time it was intended to be done;* and whatever, if any-

thing, there was to be done after that, in the way of preventing Segal's recovery of his control, in no way affected the fact that the conspiracy had long before been fully consummated.

(*d*) If this agreement of December 30, 1903, constituted a violation of the Sherman Act, the offense would have been no greater, and no less, whatever its purpose as to the length of time during which the status thus to be created should continue. The defendants' failure to restore the pre-existing condition subjected them to no criminal liability. Omissions, however morally reprehensible, unless they constitute a defect in the discharge of a legal obligation, cannot be made the basis of penal action without unduly enlarging the range of the criminal law (Wharton, C. L., *10th ed.* Sec. 130). There cannot be a "negligent conspiracy" (Id., Sec. 1341).

(*e*) But, even if this were not so, since the indictment does *not allege* any purpose to continue such status, it cannot now be reconstructed by reading into it averments which are not there.

An accused person can only be tried upon the indictment as found by the Grand Jury, "and especially upon *all its language found in the charging part* of that indictment. If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the Grand Jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury as a prerequisite to a prisoner's trial for a crime, and without which the constitution says, 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." (Mr. Justice Miller in *Ex parte* Bain, 121 U. S., 1, 10.)

(*f*) To enable the Court to determine that a conspiracy existed within a given period, it must appear from the indictment, without going further, that the unlawful agreement contemplated the commission of acts within that period (United States *v.* Cruikshank, 92 U. S., 542, 559). It is not enough that the conspiracy *might* have been extended into that period. If it is "*consistent with the averments*" that there was no such purpose *at*

the time of the agreement, it must be assumed that no such purpose then existed (United States *v.* Simmons, 96 U. S., 360, 363).

(*g*) Let us suppose that the framer of this indictment, instead of charging the agreement as a *continuing* one, originally entered into on the 30th day of December, 1903, etc., had alleged that the defendants on July 1st, 1909, conspired to do, by the same means and practices, precisely what is set forth in the indictment in its present form.

It would certainly be quite apparent upon the face of such an indictment, that it charged an utterly impossible thing, because it would charge a plan in 1909 to accomplish what had been already completely effected in 1903. Yet the very first contention urged in support of this prosecution is that the alleged conspiracy of December 30, 1903, is *charged* "as an existing agreement or conspiracy up to the filing of the indictment on July 1, 1909," which is precisely the same thing.

II.

IF THE OVERT ACTS BE TAKEN INTO CONSIDERATION, IT IS EQUALLY CLEAR THAT THE ALLEGED CONSPIRACY WAS FULLY CONSUMMATED MORE THAN FIVE YEARS BEFORE THE INDICTMENT WAS FOUND.

We have thus far ignored the allegations which charge the commission of overt acts, because, since the Sherman Law makes a conspiracy in restraint of trade an offense without the occurrence of even a single act other than the act of conspiracy, these allegations might be rejected as surplusage.

Such subsequent acts being no part of the offense (Dealy *v.* United States, 152 U. S., 539, 546; United States *v.* Britton, 108 U. S., 199, 205), the averments by which they are unnecessarily set forth are "but surplusage" (Hazen *v.* Com., 23 Pa. St., 355, 363), and hence cannot be resorted to for the purpose of determining *when* the offense, if any, was in fact committed, or for any other purpose.

The Court below, however, construed the indictment with reference to *all* of its averments, including these acts. The result of this construction is well stated in the opinion delivered by the learned District Judge. He said:

"The indictment alleges, in substance, that the defendants *conspired to prevent the Pennsylvania Sugar Refining Company from doing business.* It is alleged that *this result was accomplished;* that the defendant Kissel, acting secretly as agent of The American Sugar Refining Company, made a contract to loan to Adolph Segal $1,250,000 upon a note of Segal's, secured by certain collateral, among which collateral were 26,000 shares, being a majority of the stock of the Pennsylvania Sugar Refining Company; that having thus obtained such majority of the stock, a new board of directors, in the interest of The American Sugar Refining Company, was elected; that said board immediately voted to close the refinery of the Pennsylvania Sugar Refining Company; and *that it has since done no business*" (Record, pp. 56-7).

III.

EVEN THOUGH THE AGREEMENT DESCRIBED IN THE INDICTMENT HAD IN FACT CONTEMPLATED ACTION WITHIN THE THREE YEARS IMMEDIATELY PRECEDING THE FINDING OF THE INDICTMENT, THE OFFENSE WOULD NEVERTHELESS BE BARRED, EXCEPT AS TO SUCH OF THE PARTIES THERETO AS WERE SHOWN TO HAVE COMMITTED, WITHIN THAT PERIOD, ACTS TENDING TO EFFECT ITS PURPOSE.

The Government's proposition that a conspiracy is a continuing crime, and is in process of commission so long as the unlawful agreement *exists*, whether or not it is supplemented by overt acts, is not only unsupported by authority, but is repugnant to the fundamental principles of criminal jurisprudence.

(*a*) Acts and deeds are the subject of human laws, not thoughts and intents, unless accompanied by acts. The State does not suffer from "the mere imaginings of men. To entitle it to complain, therefore, some *act* must have followed the unlawful thought" (Bishop, New Cr. L., Sec. 204). "An *act* and evil intent must combine to constitute in law a crime" (*Id.*, Sec., 206). The law of conspiracy forms no exception to the rule, which is universal and applies to all crimes of every grade and character. It is the intent to conspire, coupled with the "*act* of conspiracy," which constitutes the offense (United States *v.* Hirsch, 100 U. S., 32, 34). "It is not a mental

offense; it does not consist in intents and imaginings. It exists where there are no overt *acts other than the agreement*" (People *v.* Mather, 4 Wend., 229, 264). "A conspiracy consists not merely in the intention of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable, if for a criminal object or for the use of criminal means." (Willes, *J.*, in Mulcahy *v.* Queen, L. R., 3 House of Lord, 306, 317). Therefore to punish a conspiracy where the end is not accomplished is not to punish a mere intention. The law strikes at the "first *manifestation* of the intent" (United States *v.* Cole, 5 McLean, 513, 516). "It is not the bare intention that the law punishes, but the *act of conspiring*, which is made a substantive offense, by the nature of the object intended to be effected. And in that respect, conspiracies are analogous to unlawful assemblies. . . . In that case it is not the bare *unexecuted intention* which the law punishes, but the *act of meeting*, connected with the *object* of that meeting, which constitutes the offense; and for that *act of meeting* alone, though it should be to do, what if actually done by one (as the pulling down of another's enclosures), would be but a civil trespass, the parties are liable to be punished by fine and imprisonment." (State *v.* Buchanan, 5 Har. & J. [Md.], 317, 355.) The Sherman Act is "not directed against a state of mind, but against a state of *facts*" (United States *v.* MacAndrews & Forbes Co., 149 Fed. Rep., 823, 830-1).

(*b*) Where the criminal agreement remains in force an indictment may nevertheless be sustained as to any *joint act* done in its furtherance within the statutory period, although three years have elapsed since the formation of the conspiracy, because by the commission of such joint act the parties to it repeat and enter anew into the original agreement. But the parties who participate in such *acts* are punishable for the new agreement only, not for the old one, the prosecution of which is barred by the statute as completely as though it had never existed. Indeed, in such a case the proper practice requires the time of the offence to be laid

on a specific day within the statute (Ware *v.* United States, 154 Fed. Rep., 578; United States *v.* Jones, 162 Fed. Rep., 417; Jones *v.* United States, 173 Fed. Rep., 584, 610; United States *v.* Greene, 100 Fed. Rep., 941, 946; 115 Fed. Rep., 349, 350; 146 Fed. Rep., 803, 888; *Ex parte* Black, 147 Fed. Rep., 838; affd. 160 Fed. Rep., 131; Lorenz *v.* United States, 24 App. D. C., 47, 337; United States *v.* Barber, 157 Fed. Rep., 899, 890; Ochs *v.* People, 25 Ill. App., 379; affd. 124; Ill., 399; Com. *v.* Bartilson, 85 Pa. St., 482, 486).

(*c*) If the Government's theory be sound the parties to an unexecuted conspiracy entered into twenty years ago may be prosecuted to-day, provided only the conspiracy, when entered into, contemplated acts which *might* still be committed, though none had been. If this be so, then have we truly a new doctrine of criminal law, by which, contrary to all previous conceptions, men, though immune for their deeds, are punishable for their "intents and imaginings."

IV.

NONE OF THE OVERT ACTS WHICH ARE CHARGED TO HAVE BEEN COMMITTED WITHIN THE PERIOD OF LIMITATION IS ALLEGED TO HAVE EFFECTED A RENEWAL OF THE AGREEMENT OF 1903; NOR IS THERE ANY AVERMENT FROM WHICH THE COURT CAN SEE THAT ANY OF THEM MIGHT HAVE OPERATED, DIRECTLY OR INDIRECTLY, TO RENEW THAT AGREEMENT, OR TO FURTHER ANY SIMILAR AGREEMENT EXISTING WITHIN THE PERIOD OF LIMITATION.

If these overt acts are to be taken into consideration, it will be seen, not only that there is no attempt to charge a renewal of the original conspiracy thereby, but that none of them was of such a character as that it could have so operated, because the object of the conspiracy had been long since fully effected.

Respectfully submitted,

JOSEPH H. CHOATE,
DE LANCEY NICOLL,
JOHN M. BOWERS,
JOHN D. LINDSAY,
Of Counsel.

November, 1910.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1910.

No. 390.

Office Supreme Court, U. S.
FILED.
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CLERK.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GUSTAV E. KISSEL AND THOMAS B. HARNED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR HARNED.

LEAVITT J. HUNT,
GEO. WHITEFIELD BETTS, Jr.,
Of Counsel for Defendant Harned.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1910, No. 390.

THE UNITED STATES, Plaintiff-in-Error,

vs.

GUSTAVE E. KISSEL and THOMAS B. HARNED,

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF DEFENDANT HARNED.

This writ of error brings up for review the judgment of the Circuit Court of the United States for the Southern District of New York, over-ruling the demurrer of the United States to please in bar interposed by the defendants Harned and Kissel, sustaining such pleas as sufficient in law and dismissing the indictment.

The defendants Harned and Kissel filed separate special pleas in bar to the indictment (Rec., pages 32, 34; 52, 54), setting up the defense of the Statute of Limitations. The United States demurred to defendants' pleas upon the ground that the facts set forth in each plea constituted in effect a plea of not guilty and demanded judgment that the pleas be held insufficient in law and over-ruled (Rec., pages 54, 55).

The defendants duly joined issue on the demurrers and duly brought the same on for argument (Rec., pages 55, 56). The Court thereupon adjudged that the demurrers

of the United States be over-ruled and that the pleas be severally sustained as insufficient in law and that the indictment be dismissed (Rec., pages 62, 63). The order and judgment over-ruling the demurrer, sustaining the plea and dismissing the indictment, were re-settled upon application of the United States (Rec., 65, 66) and an order was entered certifying that no application or motion was made to the Court at any time by the United States for leave to file replications to the allegations of the defendants' special pleas in bar (Rec., pages 69, 70).

For further and complete statement of the facts we pray leave to refer to the brief on behalf of defendant Kissel, in order to avoid unnecessary repetition.

POINT I.

THE DEFENSE OF THE STATUTE OF LIMITATIONS MAY BE SET UP BY A SPECIAL PLEA IN BAR IN CRIMINAL CASES IN THE FEDERAL COURTS.

The following authorities show that the defense of the Statute of Limitations was actually set up by a special plea in bar. In the Government's argument and brief below this proposition was conceded, and it is not seriously contended in the present brief, that the plea is not permitted.

United States vs. Cook, 17 Wall, 168.
United States vs. Norton, 91 U. S., 566.
United States vs. Hirsch, 100 U. S., 33.
United States vs. Irvine, 98 U. S., 450.
United States vs. Hewecker, 79 Fed., 59.
United States vs. Brace, 143 Fed., 703.
Bishop's New Crim. Pro., Vol. 1, Sec. 799.

The case of the defendant Harned is peculiarly one where the general rule permitting this defense to be set

up by special plea should be applied, and well illustrates why the Statute of Limitations itself, specifically directs *that no person shall be "prosecuted, tried or convicted"* if three years have elapsed, after the commission of the alleged offense.

It will be seen that not a single act is alleged, either in the offense charged or among the overt acts charged, to have been done by the defendant Harned since December 30th, 1903, more than five years before the finding of the indictment. Neither is it shown or alleged that he did any act or thing directly or indirectly whatsoever since 1903 in pursuance or furtherance of, or to effect or tending to effect the said conspiracy, or that he had any knowledge of or in any way participated in or ratified any of the alleged acts of others.

It needs no argument to show the unfairness of compelling the defendant Harned to try his defense of the Statute of Limitations, at the same time and before the same jury, before which all the other defendants might be tried under the general issue. It would be practically impossible for a jury to differentiate the testimony and documentary evidence, so as to distinguish between the issues.

Furthermore, if the Government were permitted to put in its evidence in regard to the alleged criminal offense, is it fair to assume that the defendants should sit meekly by and not disprove such evidence? Patently the expense and stigma of a trial would have to be incurred, even though they should be declared innocent, or it should be found that they could not be convicted because of the statute. Also what would become of the specific mandate of the statute that they shall not be prosecuted or tried, unless the indictment be found within three years of the alleged offense.

The intent and purpose of the Statute is not to

impose a stigma upon the person setting it up; it is not a confession of the alleged crime; it is rather a direction that a defendant need not answer or even be compelled to prepare for trial for the alleged offense unless the indictment is found within three years of the commission thereof.

It is analogous to pleading the Statute of Limitations in a civil action for debt, the purpose of pleading the Statute being not to relieve the defendant from paying a just debt or to compel him to admit that he owed the debt, but is rather to prevent the defendant from undertaking the burden of obtaining or preserving evidence such as receipts, etc., to prove payment more than six years previous to the beginning of the action. The reason for such a protection to defendants in criminal cases, where the liberty of the citizen is involved, is even more apparent than in civil. The death of witnesses, the loss of memoranda or books, and the failure of memories, are among the reasons which have brought about such beneficent legislation.

For further authorities and arguments in support of this proposition, we pray leave to refer to the brief of the defendant Kissel.

POINT II.

ADMITTING, FOR THE PURPOSE OF ARGUMENT, THAT THE DEFENDANT HARNED'S PLEA IS IN THE NATURE OF A PLEA OF CONFESSION AND AVOIDANCE OR DEMURRER; INASMUCH AS THE INDICTMENT FAILS TO ALLEGE ANY FACT SHOWING THAT THE ALLEGED CONSPIRACY EXISTED OR WAS IN OPERATION, IN SO FAR AS THE DEFENDANT HARNED IS CONCERNED, WITHIN THREE YEARS PRIOR TO THE INDICTMENT, THE PLEA WAS PROPERLY SUSTAINED, AND THE INDICTMENT DISMISSED.

Although there are fourteen counts to the indictment, they relate to the same acts and the argument may be

confined to the first count as it is equally applicable to all the other counts, relating to the alleged conspiracy.

The counts for monopolizing and attempting to monopolize trade are apparently abandoned by the Government.

To summarize briefly the first count of the indictment, it sets out that six of the defendants were directors of the American Sugar Refining Company during six years prior to the indictment, and that during the said time the said Company was engaged in Interstate trade and commerce in refined sugar and controlled 90% of such business (Rec., pages 3, 4); that on December 30th, 1903, the Pennsylvania Sugar Refining Company was ready for business and from that time would have carried on its business in competition with the said American Company, but for the unlawful and corrupt conduct as thereafter described of said defendant corporation, its directors, and of the other individual defendants (Rec., page 4).

It then charges the offence of agreement:

It charges in substance that on the 30th day of December, 1903, and continuously and at all times during said period of six years, to wit: from that day until and on the day of the finding of this indictment, the defendants have engaged in an unlawful and corrupt conspiracy among themselves in restraint of trade and commerce by the means and practices described in substance as follows:

FIRST.—That the defendants had knowledge that one Segal had the controlling interest in the stock of the Pennsylvania Sugar Refining Company and that they *were to get* from said Segal, the possession of said stock and authority to vote the same, and thereby secure the power of control over, and the management of said Pennsylvania Company, for the term of at least one year from the 4th

day of January, 1904, by means of a loan to said Segal, the details of which are therein set forth.

SECOND.—That when the power of control over the management of the Pennsylvania Company, should be so acquired, the defendants *were to use every means* in their power to extend said term and said power of control beyond the one year, by keeping said Segal involved in debt and his affairs in such condition as to prevent him from paying off his obligations to them and by arbitrarily refusing to accept payment of such obligations.

THIRD.—That when the power of control of the Pennsylvania Company should be so acquired, the defendants *were to make use of* the same to prevent the said Company from engaging in or carrying on its business which it was organized to carry on, and thereby bring about the ruin of said Pennsylvania Sugar Refining Company and thus eliminate the competition with the American Sugar Refining Company, which would have come into existence through the operation of the said Pennsylvania Sugar Refining Company.

Nothing is added to the alleged offense in the last paragraph of the first count (Rec., page 18) by the allegation that throughout the period of three years next proceeding the finding and presentation of this indictment that the defendants engaged in a conspiracy in restraint of trade, because there are no additional facts alleged, and furthermore it specifically states that it is "in the manner and form aforesaid."

We will discuss the allegations of the indictment to show:

A. Even if there be such a thing as a so-called continuing conspiracy, as no such conspiracy is alleged, it is unnecessary for the purpose of the present case to pass upon the question whether there can be such a conspiracy.

B. That as the only offense alleged occurred in 1903, and under any construction is shown to have been completed before January 5th, 1905, it is unnecessary to consider whether the statute runs from the first or last overt act, or whether such acts constitute a renewal of a previous conspiracy or are evidence of a continuing conspiracy.

C. That no offense is charged within the statutory period, and therefore it is unnecessary for the purposes of this case to pass upon the question whether a plea in bar, may or may not traverse time.

A.

Admitting for the purpose of argument that there be such a thing as a continuing conspiracy as contended by the Government, yet, as the indictment totally fails to allege facts showing such offense, it is unnecessary to pass upon the question as to whether there can be a so-called continuing conspiracy.

The theory of the Government is that a crime may be committed under the Sherman Act by the meeting of minds in an agreement, the purposes of which are unlawful, even though the purposes are not carried out and no overt act is shown or alleged.

The broadest possible effect that can be given to the offense charged, is that the defendants on December 30th, 1903, entered into an agreement whereby they were to get control of the Pennsylvania Sugar Refining Company for a period of one year from January 4th, 1904, and thereby they were to eliminate it from competition with the American Sugar Refining Company; also after getting control that they were to use every means in their power to continue said control beyond the period of one year.

There is absolutely no allegation in the charging part of the indictment that the conspirators did get control; that they exercised any control; that they did prevent the Pennsylvania Sugar Refining Company from opening; that they did eliminate it from competition, that they had or did use any means in their power to extend the period of one year from January 4th, or even that the refinery was ever closed, or ever ceased its operations or refrained from competition.

In fact the only offense alleged is that they were to do something. The offense charged is not what they were to do, but it was *because they had entered into an agreement*, the purposes or result of which, if carried out, would be unlawful.

The indictment after charging the defendants with entering into the conspiracy, charges that they continued to conspire down to the time of the indictment. This is the only allegation under which it can even be claimed that any sort of an offense, other than the alleged specific agreement of December 3rd, 1903, is charged.

Although the overt acts set up certain facts, the Government properly states that the overt acts cannot be taken as a part of the offense charged; they must be totally disregarded in determining what the offense charged is.

The purpose of alleging overt acts under Section 5440 of the Revised Statute was in order to maintain a prosecution; under the Sherman Act, which requires no overt acts, they might be proper to substantiate the nature or character of the offense charged, or as evidence of a renewal of the offense, so far as concerns the party participating therein, provided the offense charged sets up facts to which the overt acts were applicable.

If, in the present case, the indictment had alleged facts in that part charging the offense to show activity of the alleged continuing mental condition, such as that they did

get control and did prevent the refinery from opening, then the facts in the overt acts might have some bearing in the nature of evidential facts to substantiate the offense charged, and the allegation that such offense continued might have some meaning if a renewal were claimed, but where such facts showing activity are not set forth in the offense charged, they cannot be read into the offense from the overt acts, as admittedly the overt acts or the facts therein contained are no part of the offense charged.

It is conceded by the Government that the overt acts or the facts therein alleged cannot be used to change the character of the offense charged, or show when it occurred. Even under Section 5440 of the U. S. Rev. Stat. where an overt act was necessary before criminal prosecution could be maintained, the overt act was no part of the offense charged, and clearly under the Sherman Act, which requires no overt act, neither such acts or any of the facts therein contained can be taken as a part of or to enlarge the offense charged.

That the charging part of the indictment for conspiracy must be sufficient in itself without regard to the purposes or intents, or overt acts, especially under the Sherman Act, and where it is not claimed they constitute a renewal, is well illustrated by the following cases:

> Commonwealth vs. Bartilson, 85 Pa. St., 482, 486.
>
> United States vs. Britton, 108 U. S., 199, 204.

"The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely

affords a *locus penitentioe,* so that before the acts done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under Section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. Reg. vs, King, 7 Q. B. 782; Commonwealth vs. Shedd, 7 Cush. 514."

People vs. Mather, 4 Wend., 229, 264, speaking of conspiracy, the Court stated:

"It is not a mental offense; it does not consist in intents and imaginations. It exists where there are no overt acts *other than the agreement."*

Dealy vs. United States, 152 U. S., 539, 547.
Pettibone vs. United States, 148 U. S., 179, 202.
Williamson vs. United States, 207 U. S., 425.
United States vs. Hess, 124 U. S., 483.
Lidbitter vs. United States, 170 U. S., 606.
United States vs. Cruckshank, 92 U. S., 542, 558.

It is therefore conclusively shown, which apparently is not contradicted, that the conspiracy charged was the agreement of December 30th, 1903, whereby the conspirators had agreed that they were to do something; the offense was not what they were to do, but because they had agreed that they were to do something, if carried out would be unlawful.

However, the Government contends that by merely alleging that this agreement of December 30, 1910, continued down to the date of the indictment, is a sufficient state-

ment of fact to show that an indictable offense was alleged, each and every day from December 30, 1903, to the date of the indictment, July 1, 1909.

True, there is an allegation that after the conspirators should have acquired control for the term of one year "they were to use every means in their power to extend said terms and power of control," but this patently is not an allegation of any fact showing that the alleged offense continued. The offense was not the getting control; that fact is not even alleged. The offense was the agreement that they were to get control, etc. Furthermore, there is no allegation that they ever exercised control or that the term was ever extended.

Therefore, the Government must stand or fall on the bare allegation that the offense continued. It apparently is conceded by the Government that there is no fact alleged showing that the alleged conspiracy continued other than the bare allegation that it did continue; hence unless the Government's contention, that this is an allegation of fact, is sustained, it has failed to allege a continuing conspiracy.

It is a significant fact that the Government failed to allege as a part of the offense charged that the parties did obtain control over the Pennsylvania Sugar Refining Company or prevented it from conducting its business, or that they did eliminate it from competition in restraint of trade with the American Sugar Refining Company. This omission was not an oversight, neither was it made through mistake or inability on the part of the Government to charge as the alleged offense that the parties actually acquired control and prevented the refinery from opening and thus eliminated it from competition, which the known facts might have warranted; on the contrary it was done in a deliberate attempt on the part of the Government to avoid charging an alleged crime that might have been

charged from the known facts, because it was self-evident that such a crime was barred by the statute.

It is further worthy of note that the Government set up the facts from which the offense that the defendants actually prevented the refinery from opening, etc., might have been alleged under the overt acts, and at the same time strenuously invoked the rule, which is undoubtedly good law, that the overt acts or the facts therein contained are no part of the offense charged. The patent reason for invoking this rule is because, if those facts were considered, it would be evident that the alleged crime was complete December 30th, 1903, or in any event before January 5th, 1905.

As a matter of fact inasmuch as the Government concedes, in fact urges, that in order to constitute a conspiracy under the Sherman Act, no overt acts need be alleged or shown, it is difficult to comprehend why the overt acts were set up at all, unless for the purpose of using the facts contained therein, in argument, in confusing the offense charged with the result thereof.

It is not clear whether the Government takes the position squarely, that if an agreement constituting a crime is alleged to have been made in 1903, then it is alleged that that agreement lies dormant in the minds of the conspirators in 1909, that that mental condition is an offense susceptible of prosecution and punishment under the Sherman Act. Nevertheless, this is the position it must take under the offense they have seen fit to allege, because as the only offense alleged is the meeting of minds on December 30th, 1903, it conclusively follows that the word "continued" refers to the continuance of the previous mental condition.

To further illustrate, in the present case, the allegation that the defendants engaged in an unlawful and corrupt conspiracy among themselves on December 30th, taken in

connection with that part of the indictment charging the offense, viz: that they were to get control, etc., is an allegation of fact susceptible of proof; but in the absence of alleging any other facts or series of facts, it clearly cannot be said that the specific offense charged is changed into a different offense or series of offenses by the use of the word "continue," and hence the word "continue" must refer to the alleged mental condition of the minds of December 30th, 1903.

It is undoubted law that the bare allegation of mental condition of a person or persons is not in itself an allegation of crime; there must be some activity culminating in a demonstration susceptible of being alleged as a fact, and proved, such as a written agreement or the coming together in an oral understanding, and as there is no fact alleged in the charging part of the indictment showing any act to have been done or that there was any further mental activity, beyond that of December 30th, the insertion by the pleader of an allegation that this mental condition continued necessarily is nothing more than his belief unsupported by any fact, and is mere surplusage or conclusion.

That the public prosecutor cannot change the facts constituting the offense into a so-called continuing offense by so framing his indictment charging the agreement to commit the offense rather than the offense, and thus deprive the defendant from setting up the Statute, is well illustrated in the opinion of the learned District Judge in delivering the opinion in this case below, where he stated:

> "There seems to be an increasing tendency in recent years for public prosecutors to indict for conspiracies when crimes have been committed. A conspiracy to commit a crime may be a sufficiently ser-

ious offense to be properly punished; but when a crime has been actually committed by two or more persons, there is usually no proper reason why they should be indicted for the agreement to commit the crime instead of for the crime itself. A large class of federal prosecutions for commercial offenses, such, for instance, as violations of the interstate-commerce act, the Sherman Act, the bankrupt act, the acts relating to public lands, and many others, now habitually take the form of indictments for conspiracies to commit crimes, the actual commission of which is also usually alleged in the indictment. Prosecutors seem to think that by this practice all statutes of limitations and many of the rules of evidence established for the protection of persons charged with crime can be disregarded. But there is no mysterious potency in the word conspiracy. If a conspiracy to commit a crime has been carried out, and the crime committed, the crime, in my opinion, cannot be made something else by being called a conspiracy. The men who have committed the crime are liable to whatever penalties the law imposes, and to whatever protection the law affords. If the statute of limitations is a bar to a prosecution for the crime, that bar, in my opinion, cannot be lifted by a prosecution for a conspiracy to commit that crime. Statutes of limitation are beneficial Statutes. The interest of the community and justice to persons charged with crime require that offenses be promptly prosecuted. Statutes of limitations should be given a plain and sensible construction. Their effect should not be frittered away by a strained interpretation, based on subtle and refined reasoning. The Government has waited, before bringing this prosecution, for five years and a half after the alleged offense was complete, and, in my

opinion, the statute of limitations is a bar to this indictment" (Rec., pages 50, 51).

The Government having charged as the offense the conspiracy or agreement to do something rather than what was done, it is submitted that it cannot change the facts constituting the offense by confusing in argument the purposes or result of the offense with the offense; the result may continue forever or the purpose may have been accomplished after a long time, or may never be accomplished, yet the only offense charged in this action is complete on December 30th, 1903, and hence it could not continue. In other words, because the Government chooses to term a given statement of facts as constituting a continuous crime, it does not conclude the Court from the consideration of those facts, and if from the facts alleged there could be no continuing offense, necessarily the allegation that it continued is mere surplusage.

Furthermore, even if the mental condition did remain unchanged, that is not a punishable offense and hence the allegation is mere surplusage.

If a contract were alleged to have been entered into on December 30th, 1903, and it was then alleged that it continued down to 1909, such an allegation might be termed an allegation of fact that the contract was an enforceable obligation in 1909; that is to say, the agreement that was enforceable was the agreement of December 30th, 1903. So in the present case it might be said to be an allegation of fact that the wrongful agreement of 1903 was in force in 1909 and the defendants could be prosecuted and tried under such a charge were it not for the Statute of Limitations. However, they would not be prosecuted or tried for any fanciful condition of mind in 1909,—they would be tried for the offense charged in 1903, and the word continued would not be an allegation of any fact, showing that any offense other than the

specific offense charged in 1903 was in existence or continued. Because an agreement is enforceable over a period of time, that does not mean that the parties are entering into an agreement continuously. The only purpose of such an absurd and strained construction could be to nullify the statute of limitations for the benefit of a delinquent prosecutor.

In U. S. vs. Macandrews & Forbes Co., 149 Fed. Rep., 823, at 830-1, the court stated: The Sherman Act is "not directed against a state of minds but against a state of facts."

In Mulcahy vs. Reg., L. R., 3 H. L. Cas., 306, 317, the court stated:

> "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. *So long as such a design rests in intention only, it is not indictable.* When two agree to carry it into effect, *the very plot is an act in itself.*"

Further, if the pleader can, after alleging as the crime the meeting of minds to do something, by simply alleging that that offense continued, prevent the defendant from setting up the statutes of limitations, the question whether the statute could be pleaded would not depend upon the facts alleged, but upon whether the pleader chose to state that it continued. In fact, if the pleader conscientiously believed that the conspirators continued of the same conviction, he could by simply alleging continuity without alleging any facts showing any further active meeting of the minds and without ever being able to prove any other fact, unless the conspirators confessed as to their mental condition, prevent them from pleading the statute.

It must be conceded that the offense charged, that they were to do something, cannot be changed into an offense

that they did something, by using the word "continuing." The Government is, therefore in the position, if the alleged conspiracy continues in the year 1909, of charging these defendants with the offense, that they were to get control of the stock and were to prevent the Pennsylvania Sugar Refining Company from opening in 1909. This further illustrates the absurdity of the contention that the alleged conspiracy in the present case could be a continuing conspiracy, because if the facts set forth in the overt acts are true, which show that they obtained control and took action to prevent the refinery from opening in 1903, they would be tried for conspiring to do something in 1909, which had already been done in 1903.

To further illustrate in that part of the indictment charging the offense, it will be seen that not a single fact is alleged to show any mental or physical activity since December 30th, 1903, therefore, the only offense charged to continue, even admitting that the word "continue" is a proper allegation of fact, is an alleged dormant mental intention, but as this is not a crime, it conclusively follows that no continuing offense is charged, as, if the offense referred to is not an offense, it cannot be said that the offense continues and hence the word continued is mere surplusage.

Although this discussion as to what the indictment charges may appear to be refined and technical, it will be seen that it goes to the very merits of the question involved and it is brought about, not through any effort of the defendant to avoid meeting on the merits any crime alleged, but by reason of the Government's endeavor to charge an offense which does not exist, by avoiding a plain statement of the facts constituting what in reality it should have alleged to have been the crime, which patently would have been barred by the statute.

To summarize, our position is that even admitting that the word "continue" may be a proper allegation of fact in

some instances, as the fact to which it refers in the present case is a mere dormant mental condition, which cannot constitute an offense, it cannot be said that a continuing offense is alleged.

Therefore, whether a conspiracy may or may not be continuing offense or whether the word "continuing" may or may not be an allegation of fact, is unnecessary to be determined in order to decided the present case, because the facts which the government has seen fit to set up as constituting the offense, show that such an offense could not have continued, but was complete on December 30th, 1903.

B.

There is no question involved in the present case as to whether the statute runs from the first or last overt act; it is not even claimed that they show any renewal, and as it is conclusively shown above that the offense charged could not be a continuing one but was complete on December 30th, 1903, necessarily the statute commenced to run on that day.

In fact, in the present case, inasmuch as admittedly overt acts are unnecessary under the Sherman Act and it is not claimed that they constitute a renewal, or that any renewal is charged, they amount to mere surplusage.

Hazen v. Com., 23 Pa. St., 355 at 366.
Dealy v. U. S., 152 U. S., 539.
United States v. Britton, 108 U. S., 199, 205.

C

It is unnecessary for the purpose of this case to pass upon the question whether a plea in bar may or may not traverse time.

It necessarily follows that inasmuch as the indictment as shown in sub-division "A" charges no offense other than the completed offense of December 30th, 1903, and inasmuch as the Government does not even contend that there was any renewal of that offense charged, it necessarily follows that no time was charged subsequent to Dec. 30th, 1903, hence the plea did not traverse any allegation of time, and the question is not involved in the determination of the present case.

That the Government cannot be calling the offense a conspiracy and stating that it continued, read into the offense charged, facts that do not exist, is further illustrated by the opinion below of Judge Holt, where the purposes of the alleged offense were evidently considered including the overt acts (which it is shown cannot be done), yet, nevertheless, the entire offense is shown to have been completed in any event on January 4th, 1904.

> "It is also conceded that the execution of the contract between Kissel and Segal, by which the loan was made and the control of a majority of the stock of the Pennsylvania Company obtained, the consent of the Champion Construction Company to the pledge of the stock, the power of attorney by that company to Kissel, the election of the new directors, the meeting of the new board, at which the vote was passed that the Pennsylvania Sugar Refining Company should thereafter refrain from carrying on business until the further order of said board, the advance of $1,250,000 by The American Sugar Refining Company to Kissel, and the loan of that amount by Kissel to Segal *were all done, and the entire transaction closed in all respects on or before January* 4, 1904. *Therefore, the offense alleged in this indictment was complete, and this indictmnet might have been brought on January* 5th, 1904" (Rec., page 57).

In conclusion, without considering the effect of the plea, (except the allegation that the defendant was not a fugitive from justice) and the demurrer thereto, and irrespective of whether a conspiracy may be a continuing offense, or whether the first or last overt act is to be taken as the time from which the statute begins to run, or whether a conspiracy is a renewable offense, or whether a plea in bar may or may not traverse time; are all matters unnecessary to be passed upon for the determination of the case before the Court, because from the facts in the present case it is shown that no continuing or renewable offense is alleged; the only offense alleged is that of December 30th, 1903, from which time the statute begins to run.

POINT III.

Even if the overt acts are available under the offense charged (although as we have seen they are not) yet, the facts alleged fail to show the commission, the existence, or the continuance of any crime within three years against any of the defendants, and certainly as against the defendant Harned.

Admitting for the purpose of argument that the allegations of the indictment are sufficiently broad to permit the alleged overt acts to be considered in order to show that an alleged offense was committed within three years from the finding of the indictment, and that the facts in the overt acts may be read into the indictment as a part of the offense charged [which disregard the rule that the material facts must be set out in the charging part of the indictment and recourse can-

not be had to the overt acts and that a crime cannot be charged by inference, etc., U. S. vs. Britton, 108 U. S., 199, 205; U. S. vs. Hess, 124 U. S., 483; Hazen vs. Com., 23 Pa. St., 355; Ex parte Bain, 121 U. S., 1; 10] and admitting further that the authorities which hold that the statute begins to run from the last overt act should govern, and disregarding the plea other than that the defendants were not fugitives from justice, yet nevertheless, no crime is shown to exist within the statutory period.

Solely for the purpose of abbreviating the argument by assuming that some or all of the overt acts up to May 3rd, 1905, the date of the last overt act alleged prior to the commencement of the three-year period (July 1st, 1906), before the finding of the indictment (July 1, 1909), show or tend to show the existence of a conspiracy (although it is apparent that they do not), we then come to the proposition, do any of the overt acts alleged to have been done within the statutory period show that they were done to effect the object of the conspiracy, (a) as to any of the defendants; (b) as to the defendant Harned.

We submit that it is shown from the brief of the defendant Kissel, to which we pray leave to refer, that the overt acts did not effect the object of the conspiracy and therefore could not have operated to show the continuance of the offense or its renewal.

As to the defendant Harned, disregarding the fact that the Government in its demurrer admitted the allegation of the defendant Harned's plea, denying "that the conspiracy existed within the three years or that the said defendant had done any act or thing or committed any overt act, directly or indirectly in pursuance or in ratification of or to effect, or tending to effect, the objects of any conspiracy, or in furtherance of any offenses set forth in the indictment, and that the acts and things alleged to have been done within said period of three years by others were not

acts or things in aid or furtherance of or to effect, or tending to effect the object of the conspiracy and that said acts were not done with defendant's knowledge or consent, participation, agreement, authority or ratification," and admitting the theory of the Government in toto, it has failed to show that any crime is alleged or is charged against Harned since 1903; unless possibly it can be said that the counsel's argument is sound, that the burden is on defendant to show that he has purged his mind of an alleged evil intent; such practice, however, is unknown to the criminal law even since the early Roman days, with the possible exception of the prosecution for witchcraft, when persons were burned at the stake for failure to disprove alleged mental operations.

There is absolutely no overt act charged as having been done by Harned since December 30th, 1903, more than five and one-half years prior to the finding of the indictment; and the overt acts within the three year period not only do not tend to affect the object of the conspiracy, but do not show or tend to show that Harned directly or indirectly, or even by inference, had anything to do with such acts. Neither is it alleged that the acts of others were done with his knowledge or consent, participation, agreement, authority or ratification; in fact by the demurrer, it was admitted by the Government that they were not done with such knowledge or participation etc. From the argument of counsel, it apparently is not seriously contended that these overt acts of others are shown to in any way connect Harned, directly or indirectly, or even by inference. It is therefore difficult to comprehend upon what theory they could have been said to show an offense against Harned, or operate to start the statute running.

Also, as is apparent as shown by the Government's brief, that as to the defendant Harned, inasmuch as he is not shown to be connected directly or indirectly or by inference

with any of the alleged acts or even the purposes of the alleged offense, for more than five and one-half years before indictment was found; the Court might well find that as to him, upon any theory, that the conspiracy had been abandoned; furthermore as to him the Government apparently does not impute this extraordinary theory that he should forever disprove his alleged mental condition, unsupported by any fact that it continued.

The effect of considering the overt acts in the present case was passed upon by the Circuit Court below in the following language:

> "If this indictment had charged, in the language of the act, that the defendants had made a contract in restraint of trade, I suppose no one would claim that the statute of limitations did not begin to run upon the execution of the contract. How can the Government impose a different liability on the defendants by calling the same thing a conspiracy? I think that the offense was complete in this case when the contract between Kissel and Segal was made. It was unquestionably complete before January 5, 1904, before which date the contract was carried out in all respects, and the object accomplished. If, however, the doctrine of the class of cases which hold that each new overt act constitutes a new offense, in prosecutions under sec. 5440, were to be followed in this case, the overt acts alleged to have occurred within three years, necessary to constitute a new offense, must be acts which have a tendency to carry out the object of the conspiracy, or in some way tend to make it effectual (United States vs. McLaughlin, 169 Fed., 307; United States vs. Black, 160 Fed., 431); *and each defendant must have participated intentionally in an overt act done within three years prior to the indictment* (*Ware* vs. *United States*, 154 *Fed.*, 579). *So far as the defendant Harned is*

concerned, he had nothing to do with any overt act alleged in the indictment after December 30, 1903. As to the defendant Kissel, the overt acts alleged in the indictment as occurring within three years before it was filed, in my opinion, are not acts which had any tendency to carry out the object of the conspiracy, or to make it effectual. * * * In my opinion these alleged overt acts had no tendency to accomplish the object of the conspiracy" (Rec., pages 59, 60).

Therefore even by considering the facts alleged in the overt acts, it is conclusively shown that no offense is alleged as against the defendant Harned within the statutory period of three years.

POINT IV.

The indictment was properly dismissed.

The authorities show that where a special plea setting up the Statute of Limitations is demurred to by the Government, and the special plea is sustained, the whole proceeding is, as a rule, terminated.

United States v. Hewecker, 79 Fed. Rep., 59, 65.
United States v. Norton, 91 U. S., 566.
United States v. Hirsch, 100 U. S., 33.

For example, in U. S. vs. Norton (supra), it appears at page 569 that the negative answer of the Supreme Court to the question certified to it by the Circuit Court viz: Whether the defendant could be prosecuted, tried or punished where the indictment was not found within two years of the committing of the offenses (the question having arisen on demurrer to the plea of the Statute of Limita-

tions), *was equivalent to a termination of the whole prosecution.*

Again in U. S. vs. Hirsch, 100 U. S., page 33, where the Statute of Limitations was set up by special plea in bar to a prosecution under Section 5440, Rev. Stat, and the Government demurred to the plea, the Supreme Court certified to the Circuit Court "that the plea of the Statutes of Limitations of three years *is good in bar of the first two counts of the indictment*" (Opinion of the Court by Miller, J., page 36).

It is evident that the Supreme Court, having so certified to the Circuit Court, the Circuit Court was bound by the opinion to hold that the Statute *was a bar* and this necessarily terminated the whole proceeding.

Where the question of the bar of the Statutes of Limitations can be disposed of in this way, on demurrer to the special plea, this is obviously the proper course to pursue, for it recognized the mandate of the Statute that not only shall no person be punished for any offense not committed within the three years, but that no person shall be *prosecuted or tried for the same.*

Furthermore an examination of the indictment and the plea of the defendant Harned will show that there is really no dispute as to the facts, between the Government and the defendant. The only overt acts charged against the defendant Harned are the signing of the consent of the Champion Construction Company, of which he was President, to the use of its stock under the loan, and the signing of the proxy to vote such stock [Rec., page 107]. These acts are shown to have been committed on December 30th, 1903.

As to the other alleged overt acts charged to have been committed by some of the other defendants, subsequent to the beginning of the three year period, there is no statement or intimation in the indictment that the defendant

Harned ever authorized, participated, ratified in or even had any knowledge of such facts.

Irrespective of the fact that the Government did not ask leave to plead over as the ruling involved a matter of discretion of the Court below, no case of abuse of such discretion can possibly be shown, and hence the judgment should be sustained.

Furthermore, as is conclusively shown by the brief of the defendant Kissel that if no error was committed in the Court below, the final judgment should not be reversed simply to permit the United States to plead over.

We pray leave to refer to this point and the other points in the brief of the defendant Kissel and that they may be taken as a part hereof in order to avoid repetition.

CONCLUSION.

For the foregoing reasons, the judgment below should be affirmed on the ground that the Trial Court committed no error.

November , 1910.

LEAVITT J. HUNT,
GEO. WHITEFIELD BETTS, Jr.,
Of Counsel for Defendant,
Harned.

5

UNITED STATES *v.* KISSEL AND HARNED.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 390. Argued November 10, 11, 1910.—Decided December 12, 1910.

Under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, when the indictment is quashed this court is confined to a consideration of the grounds of decision mentioned in such statute, *United States* v. *Keitel*, 211 U. S. 370, and there is a similar limit when the case comes up from a judgment sustaining a special plea in bar.

Although mere continuance of result of a crime does not continue the crime itself, if such continuance of result depends upon continuous coöperation of the conspirators, the conspiracy continues until the time of its abandonment or success.

A conspiracy in restraint of trade is more than a contract in restraint of trade; the latter is instantaneous, but the former is a partnership in criminal purposes and as such may have continuance in time; and so held in regard to a conspiracy made criminal by the Anti-trust Act of July 2, 1890.

Whether the indictment in this case charges a continuing conspiracy with technical sufficiency is not before the court on the appeal taken under the Criminal Appeals Act of March 2, 1907, from a judgment sustaining special pleas of limitation in bar.

Allegations in the indictment consistent with other facts alleged that a conspiracy continued until the date of filing must be denied under the general issue and cannot be met by special plea in bar.

This court, having on an appeal under the Criminal Appeals Act of March 2, 1907, held that allegations as to continuance of a conspiracy cannot be met by special plea in bar, all defenses, including that of limitations by the ending of the conspiracy more than three

years before the finding of the indictment, will be open under the general issue and unaffected by this decision.

173 Fed. Rep. 823, reversed.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Fowler for the United States. A brief which had been prepared by the late *Mr. Solicitor General Bowers* was filed for the United States.

Mr. Leavitt J. Hunt and *Mr. Geo. W. Betts, Jr.*, filed a brief for defendant in error, Harned. *Mr. Joseph H. Choate* and *Mr. William D. Guthrie*, with whom *Mr. Howard S. Gans* and *Mr. William C. Osborn* were on the brief, for the defendant, Kissel, in error:

Conspiracy is a non-continuous crime, and an indictment which charges its commission on a date barred by the statute of limitations charges an outlawed offense and is not saved by an allegation of continuance within the limitation. *United States* v. *Irvine*, 98 U. S. 450.

Where an indictment charges a crime which is not essentially continuous with a *continuando*, the *continuando* may be disregarded and the indictment treated as charging no more than the commission of the offense on the first day. Wharton's Crim. Pl. & Pr., 9th ed., § 125; 1 Bishop's New Crim. Proc., § 388; Starkey's Crim. Pl., 1st Am. ed., 60, 61; *King* v. *Dixon*, 10 Mod. 335, 337; *United States* v. *La Coste*, 2 Mason, 129; *People* v. *Adams*, 17 Wend. 475, 476; *Wells* v. *Commonwealth*, 12 Gray, 326; *State* v. *Nichols*, 58 N. H. 41; *Cook* v. *State*, 11 Georgia, 53, 56; *State* v. *Briggs*, 68 Iowa, 416; *State* v. *Thompson*, 31 Utah, 228; *State* v. *Jasper*, 15 N. Car. 323.

At common law and under the Sherman Act, the offense of conspiracy is complete; the crime is actually committed when the design or intent is followed by the

act of agreeing or confederating; it is the bare act of agreeing alone that constitutes the crime. Archibold's Crim. Pl., 22d ed., 1209; 2 Bishop's New Crim. Law, §§ 171; *United States* v. *Hirsch*, 100 U. S. 33; *United States* v. *Britton*, 108 U. S. 199, 204; and see *Pettibone* v. *United States*, 148 U. S. 197, 202; *Dealy* v. *United States*, 152 U. S. 539, 547; *Bannon* v. *United States*, 156 U. S. 464, 468; *Williams* v. *United States*, 207 U. S. 425, 447; *United States* v. *Donau*, 11 Blatchf. 168; *State* v. *Buchanan*, 5 H. & J. (Md.) 317, 355; *People* v. *Mather*, 4 Wend. 229, 264; *O'Connell* v. *The Queen*, 11 C. & F. 155, 233; *Mulcahy* v. *Reg.*, L. R. 3 H. L. Cas. 306, 317; *Commonwealth* v. *Judd*, 2 Massachusetts, 329, 337; *People* v. *Flack*, 125 N. Y. 324, 332.

But many crimes, which are non-continuous, are by their nature subject to renewal, and in such case, each renewal of the act constituting the gravamen of the offense constitutes a new crime. It is the nature of the act constituting the offense that determines its continuous or non-continuous nature. *State* v. *Poyner*, 134 N. Car. 609; Wharton's Crim. Law, 10th ed., § 27; *State* v. *Prescott*, 33 N. H. 212, 214; *State* v. *Thompson*, 31 Utah, 228, 231; *State* v. *Briggs*, 68 Iowa, 416, 419; *Matter of Neilsen*, 131 U. S. 176; *In re Snow*, 120 U. S. 274; *Gise* v. *Commonwealth*, 31 P. F. Smith (Pa.), 428; *Cook* v. *State*, 11 Georgia, 53, 56; *People* v. *Flatherty*, 162 N. Y. 532, 538.

The results which flow from conspiracy, *i. e.*, the acts done in pursuance of it, form no part of the offense; but a compact which does not contain within itself all the elements of wrong will not be rendered indictable by the criminality of acts done in furtherance of it. *United States* v. *Britton*, 108 U. S. 199; *McKenna* v. *United States*, 127 Fed. Rep. 88; *Salla* v. *United States*, 104 Fed. Rep. 544; *Conrad* v. *United States*, 127 Fed. Rep. 798.

Acts done in pursuance of a conspiracy, and in furtherance of it, are so far from being a part of the offense that

one of the defendants, by a would-be competitor, the Pennsylvania Sugar Refining Company. It then sets forth, at length, the means by which the alleged purpose was to be accomplished, and what are put forward as overt acts done in pursuance of the plan. In other counts, referring to the first, the defendants are alleged to have conspired to monopolize the trade in refined sugar among the States. They are similar counts as to the trade in raw sugar and molasses, and as to trade with foreign nations. The offenses aimed at, of course, are the conspiracies punished by the act of July 2, 1890, c. 647, 26 Stat. 209, commonly known as the Sherman Act.

There are other counts in the indictment, but the argument was devoted mainly to these. The defendants severally pleaded to all of them the limitation of three years fixed by Rev. Stat., § 1044, alleging that for more than three years before the finding of the indictment on July 1, 1909, they did not engage in, or do any act in aid of, such conspiracies. The defendant Kissel added averments that all the overt acts alleged to have been done within three years before July 1, 1906, were done without his participation, consent or knowledge. He also pleaded that since October 6, 1906, the Pennsylvania Sugar Refining Company had been in the hands of a duly appointed receiver.

We deem it unnecessary to state the pleadings with more particularity, because the only question before us under the act of March 2, 1907, c. 2564, 34 Stat. 1246, is whether the plea in bar can be sustained. That this court is confined to a consideration of the grounds of decision mentioned in the statute when an indictment is quashed was decided in *United States* v. *Keitel*, 211 U. S. 370, 399. We think that there is a similar limit when the case comes up under the other clause of the act, from a "judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." This being so, we are not concerned with the technical sufficiency or redundancy of the

indictment, or even, in the view that we presently shall express, with any consideration of the nature of the overt acts alleged. The indictment charges a conspiracy beginning in 1903, but continuing down to the date of filing. It pretty nearly was conceded that if a conspiracy of this kind can be continuous, then the pleas in bar are bad. Therefore we first will consider whether a conspiracy can have continuance in time.

The defendants argue that a conspiracy is a completed crime as soon as formed, that it is simply a case of unlawful agreement, and that therefore the *continuando* may be disregarded and a plea is proper to show that the statute of limitations has run. Subsequent acts in pursuance of the agreement may renew the conspiracy or be evidence of a renewal, but do not change the nature of the original offense. So also, it is said, the fact that an unlawful contract contemplates future acts or that the results of a successful conspiracy endure to a much later date does not affect the character of the crime.

The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States* v. *Irvine*, 98 U. S. 450. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous coöperation of the conspirators to keep it up, and there is such continuous coöperation, it is a perversion of natural thought and of natural language to call such continuous coöperation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates

that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act.

The means contemplated for the exclusion of the Pennsylvania Sugar Refining Company were the making of a large loan by the American Sugar Refining Company through Kissel to one Segal and the receiving from him of more than half the stock of the Pennsylvania Company with a power of attorney to vote upon it, Segal not knowing that the American Company was behind Kissel. The loan was to be for a year, but the American Company was to use the power of voting to prevent the Pennsylvania Company from going on with its business, and, as Segal was dependent largely upon the returns from that company for means of repaying the loan, he was to be prevented from repaying it and the control of the Pennsylvania Company retained until it should be ruined and finally driven from business. It is alleged that the loan was made and that a vote was passed that the Pennsylvania Company refrain from business until further order of the board of directors. Now of course it well may be that the object was so far accomplished by this vote that

the conspiracy was at an end; but a vote upon pledged stock that might be redeemed was not necessarily lasting, and further action might be necessary to reach the desired result. The allegation that the conspiracy continued down to the date of the indictment is not contradicted by the vote. Furthermore, as we have said, the only question here is whether the plea of the statute of limitations is good.

Taking it that the conspiracies made criminal by the act of July 2, 1890, may have continuance, we are of opinion that the pleas are bad. To be sure, it still might be argued that the general rule that time need not be proved as laid applies to continuing offenses, that therefore the allegation in the indictment, so far as it specifies the time in which the conspiracy was maintained, is immaterial, and that a plea traversing only that is, in substance, a plea in confession and avoidance and good. Whether in a charge of a continuing offense even such specific earmarks of time as those in this indictment make it enter into the essence of the offense we shall not discuss. Time is held to be of the essence in Massachusetts and some other States; *Commonwealth* v. *Pray*, 13 Pick. 359, 364; *Commonwealth* v. *Briggs*, 11 Met. 573; *State* v. *Small*, 80 Maine, 452; *Fleming* v. *State*, 28 Tex. App. 234; while this has been thought to be a local peculiarity, and the contrary has been decided elsewhere. *State* v. *Reno*, 41 Kansas, 674, 682, 683. *State* v. *Arnold*, 98 Iowa, 253. Bishop, New Criminal Procedure, §§ 397, 402. However this may be, if the plea of the statute of limitations is good where it confesses and avoids all that the indictment avers, still, as was pointed out in an able brief by the late lamented Solicitor General, it is open to too many objections and difficulties to be encouraged or allowed except in clear cases. Apart from technical rules the averments of time in the indictment are expected and intended to be proved as laid. The overt acts relied upon coming down

to within three years of the indictment are alleged to have been done in pursuance of the conspiracy, and the pleas must be taken to deny that allegation, unless they rely upon the supposed impossibility of the acts having the character alleged. It is only by an artificial rule, if at all, that the plea can be treated as not traversing the indictment, and we are not prepared to give that supposed rule such an effect.

The discussion at the bar took a wider range than is open at this stage. It hardly is necessary to explain that we have nothing to say as to what evidence would be sufficient to prove the continuation of the conspiracy, or where the burden of pleading or proof as to abandonment would be. We deal only with a naked and highly technical question, when once the possibility of continuation is established, and as to that we cannot bring ourselves to doubt.

To sum up and repeat. The indictment charges a continuing conspiracy. Whether it does so with technical sufficiency is not before us. All that we decide is that a conspiracy may have continuance in time, and that where, as here, the indictment, consistently with the other facts, alleges that it did so continue to the date of filing, that allegation must be denied under the general issue and not by a special plea. Under the general issue all defenses, including the defense that the conspiracy was ended by success, abandonment, or otherwise more than three years before July 1, 1906, will be open and unaffected by what we now decide.

Judgment reversed.